SELECTED DECISIONS OF THE NATIVE APPEAL COURT 1934-1936

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NATIVE APPEAL COURT.

NATAL AND TRANSVAAL DIVISION

SELECTED JUDGMENTS.

CASE NO. 1.

MPONDO BIYELA VS. LANGA BIYELA.

DURBAN. 18th January, 1935. Before F.H. Brownlee, President, C.A. Mack, G.P. Wallace, Members Native Appeal Court (Transvaal and Natal Division).

Earnings of kraal inmate - Liability of Kraalhead - Sections 35 and 91, Natal Native Code.

An appeal from the Court of Native Commissioner, Mapumulo.

IF A KRAALHEAD CONTRIBUTES TO KRAAL INMATE LOBOLO WHICH REPRESENTS A SUBSTANTIAL PORTION OF THE LATTER'S EARNINGS, THE INMATE HAS NO ACTION AGAINST HIM FOR THE RETURN OF PORTION OF HIS EARNINGS.

In this case Mpondo Biyela (Appellant) appealed to the Native Commissioner's Court against a decision of Acting Chief Ntshumayelo Zulu pronounced on the 27th February, 1934, in favour of Langa Biyela (Respondent) for eight head of cattle and costs in an action in which Respondent claimed six head of cattle which he alleged represented earnings contributed towards the maintenance of the Appellant's kraal and two head of Mqoliso cattle which he alleged to be his property and which Appellant had used for his own purposes.

The Acting Native Commissioner who heard the appeal amended the Chief's judgment by reducing the number of cattle awarded to six head or their value £30 and costs, and it is against this decision that an appeal has now been brought before this Court.

The main portion of the action is founded upon a recognised native custom as laid down in Section 91 of the Natal Native Code, which provides that where a junior member of a kraal has consistently contributed towards the maintenance of the kraal under an agreement whereby the kraal-head would provide lobolo - or a portion thereof - for a wife, the refusal or failure of the kraal-head to implement such agreement will entitle the junior member to recover a reasonable portion of the earnings so contributed by him.

It is common cause that the Respondent contributed £30 towards the maintenance of the kraal, that the Appellant is the kraal-head, that he undertook to allocate the dowry to be received in respect of his sister, Kotshi, towards the dowry to be paid for Respondent's wife and that £16 and eight goats were contributed towards such latter dowry by the Appellant.

The Respondent maintains that the Appellant has not

fulfilled.....

fulfilled his undertaking in that he has only contributed a portion of Kotshi's dowry towards the lobolo payable in respect of his wife. But under the terms of Section 91 of the Natal Native Code, the Respondent's only action in these circumstances is for the return of a reasonable portion of those contributions which he had made towards the maintenance of the kraal, and as £16 and eight goats - the equivalent of £20 or two-thirds of the total amount - have been returned, this Court considers that the Appellant has sufficiently fulfilled the legal obligation imposed upon him by the terms of the section quoted. In so far as the subsidiary claim for the two head of Mqoliso cattle is concerned, this Court is in agreement with the decision given by the Acting Native Commissioner in regard thereto.

The appeal will accordingly be allowed with costs and the judgment of the Acting Native Commissioner amended to one for the Appellant with costs.

CASE NO. 2.

SKOTENI NGCOBO VS. DININGWE NGCOBO.

DURBAN. 21st January, 1935. Before F.H. Brownlee, President, C.A. Mack, G.P. Wallace, Members Native Appeal Court (Transvaal and Natal Division).

Appeal from Chief's Court - Costs.

An appeal from the Court of a Native Commissioner.

A DEFENDANT IN A CHIEF'S COURT, TENDERED ONE BEAST. HE WAS ORDERED TO PAY THREE HEAD. ON APPEAL TO NATIVE COMMISSIONER'S COURT, THE JUDGMENT WAS REDUCED TO ONE BEAST. HELD, THAT DEFENDANT WAS ENTITLED TO COSTS.

Diningwe Ngcobo sued Skoteni Ngcobo before Chief Mandhlakayise for three head of cattle being a cow and its increase which he claimed to be his by virtue of exchange for another beast killed by Skoteni. The Chief gave judgment for Diningwe for three head and costs. Against this judgment Skoteni appealed to the Native Commissioner who amended the Chief's judgment to one in favour of Diningwe for one beast and costs. Skoteni has now lodged an appeal with this Court against the judgment of the Native Commissioner in regard to the question of costs on the following grounds:-

1. That the Respondent (Diningwe), sued the Appellant (Skoteni) for three specific cattle basing his action upon an exchange between him and the late Homuhomu which cattle Appellant has in his legal possession and to which claim the Appellant denied liability but admitted having borrowed one beast from the Respondent; that the Native Commissioner found that Appellant did borrow a beast and was not indebted to Respondent for three beasts.

2. .....

2. That the Appellant had succeeded in the dispute between the parties and also in his appeal from the judgment of the Native Chief and therefore should not have been ordered to pay costs.

3. That the evidence established that the Appellant was at all times willing to repay the said loan and that he tendered same before the matter came before the Chief in the first instance.

The facts out of which this case emerges and which are not in dispute are that about seven years ago Homuhomu the father of Sikoteni (Appellant) became ill, that he had a craving for liver, that Appellant borrowed a black bull about two years old from the Respondent and slaughtered it for Homuhomu who died shortly thereafter.

Respondent stated that Homuhomu promised to give him an "insundukazi" heifer calf in exchange for the black bull, that this heifer had two increase and he claimed these three beasts.

Appellant stated that while he admitted being liable to Respondent for one beast which he had tendered, no promise was made that any specific beast would be returned in repayment of the black bull slaughtered.

The tender was admitted by Respondent's Counsel who was prepared to accept the beast tendered together with costs up to that date.

In the opinion of this Court the Appellant having been successful in his appeal against the judgment of the Chief should have been awarded his costs. The Native Commissioner found, and in the opinion of this Court rightly, that no specific beast had been promised to Respondent and it follows, therefore, that the Native Commissioner disbelieved the statements upon which Respondent based his claim.

The appeal is allowed with costs in all Courts and the judgment of the Native Commissioner altered to read: "The judgment of Chief Mandhlakayise is altered to one in favour of Diningwe for one beast or its value, £5."

RIDER: The Court notes the number of occasions on which this case was adjourned at its hearing before the Native Commissioner and in particular entries appearing on the record such as the following: "As the attorneys for the parties have not put in an appearance, case adjourned to a date to be fixed by the Clerk of the Court." "Mr. A.S. Knox and Mr. A.D.G. Clark (i.e., Counsel for the parties) do not appear." "Messrs. Knox and Clark do not appear" and again "Mr. A.S. Knox and Mr. A.D.G. Clark do not appear."

The absence of any explanation on the part of Counsel for the parties as to their reasons for failing to appear on these several occasions leaves an unfavourable impression on the minds of the Court.

CASE NO. 3.

ALINA NKALA assisted by her husband, LAZARUS NGWENYA VS. MAYIVUKE MIYA AND FOUR OTHERS.

MARITZBURG. 29th January, 1935. Before F.H. Brownlee, President, H.G.W. Arbuthnot, J.T. Braatvedt, Members Native Appeal Court (Transvaal and Natal Division).

Guardianship of married woman - Abduction - Assault - Sections 130 and 140, Natal Native Code.

An appeal from the Court of Native Commissioner, Bergville.

A WOMAN ASSAULTED BEFORE HER MARRIAGE MUST BE ASSISTED BY HER HUSBAND IN A CLAIM FOR DAMAGES BROUGHT BY HER AFTER HER MARRIAGE.

The basis of this claim is briefly that the Appellant, Alina Nkala, was abducted by Respondents 1, 3 and 4 on the 28th May, 1934, and on the following day these three men forcibly divested her of her garments exposing her while menstruating and thereby subjecting her to "ineffable indignity", shame and fear, and that this assault brought about a total cessation of menstruation. Respondents Nos. 2 and 5 are cited as being liable in terms of section 141 of the Revised Code of Native Law for the delicts of Nos. 1, 3 and 4.

The Appellant, Alina, was married to Lazarus Ngwenya in September, 1934, subsequent to the date of the alleged assault.

The Native Commissioner holding that sections 130 and 140 of the Natal Code of Native Law applied, dismissed the summons with costs stating in his reasons for judgment that "the right of action accrued on the 29th May, 1934, while the Plaintiff was living under the tutelage of her father and that consequently, if the action is successful, any sum of money recovered would become the property of the house to which she belonged prior to her customary union, and not to the house to which she now belongs, and she therefore had no locus standi in judicio to appear assisted by her husband."

This Court comes to the conclusion that the basis of the action is twofold, firstly in respect of abduction and secondly, in regard to indecent assault the which is not inherent in the act of abduction, and that while a right of action in regard to the abduction would rest in Alina's father, the injuria arising out of the alleged assault would be a cause of action vesting in the person upon whom the wrongs had been committed.

The Respondents have argued that whatever assault they may have been guilty of was committed before Alina's marriage and that this being so, the action should have been promptly instituted by her father, her natural guardian and not by herself assisted by her husband.

But.....

But it must be borne in mind that the girl having by her marriage passed out of the tutelage of her father into that of her husband, the latter is undoubtedly the right person to assist her in the claim for assault, since he was her legal guardian at the time action was taken.

The appeal is sustained with costs, the judgment of the Native Commissioner set aside and the record referred back to the lower Court with the direction that the claim for damages for assault be heard and determined on its merits.

CASE NO. 4.

NAPOZA alias DUMZANA AND ANOTHER VS. SAMUEL MATONZI.

PRETORIA. 21st March, 1935. Before F.H. Brownlee, President, C.J. Sweeney, J.C. Yeats, Members Native Appeal Court (Transvaal and Natal Division).

Native Estate - Customary Union - Native dying in employment - Native Commissioners' Powers - Government Notice 1664 of 1929.

An appeal from the Court of Native Commissioner, Benoni.

ALTHOUGH A NATIVE COMMISSIONER NEED NOT INQUIRE INTO A NATIVE ESTATE WHERE A CUSTOMARY UNION WAS CONTRACTED AND THERE ARE NO DISPUTES, A NATIVE COMMISSIONER MAY DO SO WHEN A NATIVE WAS, AT THE TIME OF HIS DEATH, IN EMPLOY OF SOME PERSON.

This case which comes from the Native Commissioner of Benoni was previously before this Court in its session in May, 1934, when there was an appeal against the ruling of the Native Commissioner on an exception. The appeal was allowed and the record was referred back to the Native Commissioner for the hearing of any further evidence either party might desire to adduce, thereafter the Native Commissioner to give a judgment on the merits.

Further evidence was taken and the Native Commissioner entered judgment as follows:-

"Claim 1. For Plaintiff for ejectment of Defendant from Stand No. 286, Benoni Location."

"Claim 2. Absolution judgment, Defendant to pay costs of action and costs of application made on 21/8/34."

Against this judgment an appeal has now been noted to this Court on the grounds:-

"(1) That the exception should have been dismissed, in as much as evidence had to be taken as to the Native Law and Custom on the question whether according to Native Law and Custom the heir of the deceased steps into the shoes of the deceased

and.....

and is entitled to the property itself and not merely to the proceeds, in the same manner as he is obliged to pay the debts, whether there are assets or not.

"(2) That in terms of Section 23(3) Act 38 of 1927, the house in question had to devolve upon the male heir according to Native Law and Custom.

"(3) That in terms of Section 2(d) of Government Notice No. 1664 dated 20th September, 1929, the house in question had to devolve, according to Native Law and Custom, upon the male heir.

"(4) That if there is anything in the aforesaid Government Notice No. 1664 authorising a Native Commissioner to realise the assets otherwise than in accordance with Native Law and Custom, such provision is ultra vires as being repugnant to Section 23(3) of Act 38 of 1927.

"(5) That even if Section 6 of the said Government Notice does authorise the sale and even if such Regulation is intra vires, both of which facts are denied, the exception nevertheless should have been dismissed, as evidence was required that the late George Ndaba was in the employ of any person or that he died without leaving a Will.

"(6) Generally, that this matter should not have been decided on an exception, firstly, because no Exceptions are provided for in Regulation 26 of Government Notice No. 2253 of 1928 (Regulations for Courts of Native Commissioners in Civil Proceedings) and, secondly, because it is entirely against the policy of procedure laid down for Courts of Native Commissioners to dispose of a matter involving difficult questions of law and fact by way of Exception."

From the evidence it appears that Appellant was married to her husband George Ndaba in accordance with Native custom. On the death of her husband she went with Respondent to the office of the Native Commissioner to report the death where Respondent put in claims against the Estate amounting to £16.5.0 being £6.5.0 funeral expenses and £10 money advanced to the deceased. These claims were lodged in the presence and hearing of Appellant who agreed to them.

At a later date Respondent applied for permission to purchase the building on Stand No. 286, Benoni Location, property in the estate of the late George Ndaba, and was allowed to do so. The purchase price agreed upon was £40. From this amount Respondent deducted £16.5.0 - liabilities to him by the estate as detailed above and paid the balance, £23.15.0 into the office of the Native Commissioner, whereafter he obtained a certificate from the Native Commissioner that he had bought the building and that there was no objection to the stand being transferred to him. On the strength of this certificate he was given transfer, from which time it is stated and not denied that Respondent paid whatever Municipal rates were due on the property.

Appellant.....

Appellant No. 1, the widow of George Ndaba, continued to reside in the building on the stand referred to and is apparently still residing there.

(It may here be conveniently stated that during the hearing of the case application was made for one Eddie Ndaba, said to be a son of the late George Ndaba by his wife the Appellant Napoza, to intervene as Appellant No. 2. No objection was taken to the proposed intervention provided the child was produced in Court. A child said to be Eddie Ndaba and son of the late George Ndaba by his wife Napoza was later produced to the Court.)

During the argument before this Court it was suggested from the Bench to the Counsel for the parties that the matters at issue appeared to depend upon whether or not the Native Commissioner had acted lawfully in disposing of the property of the late George Ndaba. Counsel for the parties having agreed that this was so, argument was confined to this point.

Section 23 sub-section (4) of the Native Administration Act (38 of 1927) lays down that any dispute or question which may arise out of the administration or distribution of any estate shall be determined by the Native Commissioner. In other words when a dispute or question actually arises and then only does the Native Commissioner step in and hold an enquiry as provided for under the regulation.

From the evidence of both parties it is clear that when the death of George Ndaba was reported to the Native Commissioner by Appellant Napoza, Respondent was actually with her, that he there and then submitted certain claims against the estate to which she agreed, this plainly indicating that no dispute or question had arisen in regard to the estate. It was only long afterwards when the Appellant Napoza was required to quit the premises that she produced the alleged heir Eddie (Appellant No. 2) and only then did the dispute arise. Up to that stage Appellant Napoza had acquiesced in the Respondent's claims against the estate. It is obvious then that nothing in the nature of a question or dispute had arisen requiring determination by the Native Commissioner who, after the death was reported, proceeded to dispose of the estate property in accordance with law. He was not, in the opinion of this Court, under the circumstances disclosed to him, required to hold an enquiry.

But to come to the real point at issue: Section 6 of Government Notice No. 1664 of 1929 provides that when a Native dies in the employ of any person then the Native Commissioner may deal with the estate.

There is evidence on the record which is not contradicted that up to the time of his death George Ndaba was in the employ of some person. The Native Commissioner was therefore justified in dealing with the estate by way of selling the estate property or otherwise, it being borne in mind that there was nothing to indicate to him that a dispute had arisen or that one might arise in the future. All he knew from the facts placed before him by the parties to this suit was that the deceased George Ndaba had left property and had incurred certain liabilities.

In.....

In the opinion of this Court the Native Commissioner acted correctly and within the scope of his legal authority in disposing of the property of the late George Ndaba. The appeal is accordingly dismissed with costs.

CASE NO. 5.

MANJOLA DUBE AND NAMHLANGA VS. MBOZA ALIAS BOY NGWENYA.

PRETORIA. 22nd March, 1935. Before F.H. Brownlee, President, C.J. Sweeney, J.C. Yeats, Members Native Appeal Court (Transvaal and Natal Division).

Liability of Kraal-head - Wife sued unassisted by husband.

An appeal from the Court of Native Commissioner, Piet Retief.

IN AN ACTION AGAINST A MARRIED WOMAN VISITING AT A KRAAL, IT IS NOT COMPETENT TO JOIN THE KRAAL-HEAD.
A MARRIED NATIVE WOMAN MAY NOT SUE OR BE SUED IN HER OWN NAME WITHOUT LEAVE FROM A COURT OF LAW.

In the Court below the Respondent sued the Appellant for the return of a cow and calf said to have been unlawfully taken from the kraal of Respondent by Appellant Namhlanga and for £5 damages. Appellant Manjola is sued in his capacity as head of the kraal where Namhlanga resides.

Appellant Manjola pleaded that he had not removed and was not in possession of any cattle belonging to Respondent, that he was not responsible for Appellant Namhlanga, was not her guardian and that she should be sued assisted by her husband. He further pleaded that the cattle were handed over freely to Namhlanga, they being the property of her husband.

Appellant Namhlanga pleaded that she is married to one Johannes Kambula and should have been sued assisted by him, that Appellant Manjola has nothing to do with the matter, that the cattle, which she took with Respondent's consent, are in her possession.

The Native Commissioner entered judgment for the return of the cattle, £2 damages and costs of suit.

Against this judgment an appeal has been lodged with this Court on the grounds:-

(1) That it is against the weight of evidence.

(2) That the action not being one of spoliation the ownership of the stock should have been considered.

(3) That Appellant Namhlanga should have been sued assisted by her husband or guardian.

(4) .....

(4) That Appellant is not an inmate of Manjola's kraal and that he is not liable for her acts.

(5) That the amount of damages is exorbitant.

(6) That the Native Commissioner erred in discarding the evidence of the Dipping Inspector.

In the opinion of this Court it has not been definitely proved that Appellant Namhlanga was anyone other than a visitor at the kraal of which Appellant Manjola is head. In other words, it has not been proved that she is in the position of one for whose delicts the kraal-head could be held responsible.

In the Natal Code of Native Law an "inmate" of a kraal for whose delicts the kraal-head may be held responsible "means a person usually residing therein". There is nothing to show that Appellant No. 2 was a person "usually residing" within the kraal of Appellant No. 1. What is laid down in the Natal Code may suitably be applied to the parties to this suit who are obviously members of a tribe allied to and closely associated with the tribes resident in Natal to whom the Code applies.

This Court holds that there is insufficient evidence upon which to warrant the citing of Appellant No. 1 as co-defendant.

It is clear from the record that Appellant No. 2 Namhlanga is a married woman, that her husband is still alive, that the man and woman have been living apart for some time, and that Namhlanga went to visit her husband's sister at the kraal of Manjola. She states: "Ek het my man se suster by Manjola gaan kuier." It appears that her husband's sister is Manjola's wife.

It is an accepted principle that a married native woman may not sue or be sued unassisted by her husband. To this principle there may be exceptions.

In the case of Priscilla Mototsi vs. Chief Athlone Mamabolo heard before this Court in August 1934 it was held that it was competent for the Native Commissioner's Court to grant "venia agendi" to a Native woman where circumstances justified it. This ruling being accepted the converse must apply, that is to say, that where the circumstances justify it application may be made to the Native Commissioner for permission to sue a married Native woman in her own name unassisted.

This Court having found that there was not sufficient evidence to justify the citation of Appellant No. 1 as a co-defendant, there remains to be discussed the position of Appellant No. 2.

This Court sees no reason on the facts now before it to depart from the principle that a married Native woman may not sue or be sued in her own name and the circumstances so far disclosed do not warrant a departure from this principle.

The Court holds on the facts before it that Defendants have not been rightly cited, in that it has not been

shown.....

shown that Appellant No. 2 is an "inmate" of the kraal of No. 1 for whose delicts No. 1 is responsible and that Appellant No. 2 is a married Native woman who may not sue or be sued in her own name without leave being granted by a court of law.

The appeal is allowed, the judgment of the Native Commissioner set aside and a judgment is now entered of "Summons dismissed with costs."

CASE NO. 6.

S.D. LETHOBA VS. RALETSEMA MADE AND S.D. LETHOBA VS. ZEELAND MASEKO.

PRETORIA. 15th May, 1935. Before F.H. Brownlee, President, Native Appeal Court (Transvaal and Natal Provinces).

Review of Taxation - Fees for conducting appeals - Tables B and C, Government Notice 2254 of 1928.

WHERE COUNSEL CONDUCTS AN APPEAL, ASSISTED BY AN ATTORNEY, THE LATTER CANNOT BE REGARDED AS CONDUCTING THE APPEAL AND HE IS NOT ENTITLED TO A FEE UNDER ITEM 2. AN ATTORNEY WHO PERFORMS ALL THE WORK IN CONNECTION WITH AN APPEAL, IS NOT ENTITLED TO THE FEE UNDER ITEM 3.

This is an application for review of the taxation of Bills of Costs by the Registrar of this Court.

Objection was taken to the review on the grounds that Applicant had accepted payment of the amount taxed and it was held in the case of Michaelis vs. Weston & Co., 4 E.D.C. 306, that such action was a bar to a review of taxation. In view of the later decision in the case of Rademeyer vs. Krook, 1920 O.P.D. 13, however, I am unable to uphold this objection.

In each of the above appeal cases, Mr. Advocate Stein of Johannesburg conducted the case for the successful party. It appears that Mr. Attorney Raubenheimer was also present in Court for the purpose of assisting and advising his Counsel. The fee for conducting the case in terms of Item 2 of Table "B" of the Schedule to Government Notice No. 2254 of the 21st December, 1928, was increased by the Court to £4.4.0. Mr. Raubenheimer in each bill of costs claimed £4.4.0 for Counsel's appearance, £4.4.0 for his own appearance in Court and £1.1.0 for his other work under Item 3. The Registrar disallowed the item of £4.4.0 for Mr. Raubenheimer's appearance in Court on the grounds that he was not conducting the case in terms of Item 2.

Mr. Raubenheimer submits that, if he had conducted the appeal himself, he would have been entitled to the fees under Items 2 and 3 of Tabel "B" so that, if nothing extra is allowed for Counsel's fee, the words "additional thereto" in Table "C" become meaningless. I am unable to agree with this argument. I consider that, if Mr. Raubenheimer conducted

the.....

the appeal himself, he would only be entitled to the fee under Item 2 of Table "B" as it is expressly provided therein that this fee is to include all charges of Attorney in Appeal Court. The fee under Item 3 is for "all other attorney's charges" and these words cannot have the same meaning as "attorney's other charges." It seems clear that, if one attorney is concerned in an appeal, he is entiteld to the fees under Item 2 only and, if two are concerned, the one who conducts the appeal is entitled to the fee under Item 2 and the one who notes the appeal, holds consultations etc. is entitled to the fee under Item 3.

I am satisfied that the Registrar's ruling is not only in accordance with the rules, but is consistent with the policy of the Department that litigants should not be deterred from seeking the assistance of this Court by the fear of having to meet a heavy bill of costs in the event of an unsuccessful appeal.

N.B.

CASE NO. 7.

NGAZANA MANYATI VS. MDHLENDHLENI SIBIYA.

ESHOWE. 15th April, 1935 Before F.H. Brownlee, President, R.W. Hancock, M.L.C. Liefeldt, Members Native Appeal Court (Natal and Transvaal Provinces).

Judgment - Liquid Debt - Taxed costs - Set-off.

An appeal from the Court of Native Commissioner, Empangeni.

WHERE A PARTY OBTAINS A JUDGMENT IN HIS FAVOUR FOR A BEAST THE VALUE OF WHICH IS FIXED BY THE COURT BUT COSTS ARE AWARDED AGAINST HIM, THE COSTS WHEN TAXED MAY BE SET-OFF AGAINST THE PRINCIPAL DEBT.

In the Court below Plaintiff sued Defendant for £14 damages alleging that he (Plaintiff) had obtained a judgment against Defendant in the Court of the Native Commissioner for the delivery of a beast or its value £4.10.0, Defendant being awarded costs which were taxed at £4.2.3. Plaintiff claimed to set off his judgment against the costs due to him by Defendant and stated that Defendant had at no time handed over the beast or paid its value.

Defendant, about September, 1932, caused a writ of execution to be taken out against Plaintiff for £4.8.6, the amount of costs due by Plaintiff as the result of which four cattle were attached. Plaintiff was given a limited time within which to dispose of the cattle attached in order to avoid a forced sale. The cattle were sold for £5.15.0, £5.5.0 of which he paid over to the Messenger in satisfaction of the amount of the writ. Plaintiff states that the cattle sold were worth £14.10.0 to him and that had he not been compelled to sell them they would have realised that amount. He stated that because of Defendant's wrongful action intaking out the writ he

suffered....

suffered damage to the amount of £14 and claimed judgment for that amount

The Native Commissioner gave judgment for Defendant with costs and against this judgment Plaintiff has appealed on the grounds:-

(a) That the finding of the Native Commissioner as a fact that the Plaintiff (Respondent) was awaiting instructions for the delivery of the animal is not supported by the evidence and that there is no evidence that the Defendant (Appellant) accepted or ever intended to accept the animal.

(b) That the Native Commissioner was wrong in finding that the debts between the parties were not of the same kind and that Respondent's debt had not been liquidated and quoted the case of Symon vs. Brecher, T.S. 1904, adding that an offer by the Respondent to settle the judgment (in the alternative) in cash might validly have been made and could not have been refused by the Appellant.

(c) That the Native Commissioner was wrong in holding that the common law of set-off is not part of the Native law of Zululand.

(d) That there was no evidence that Appellant had at all times been ready to give delivery of the animal awarded and he should have held that the issue of the writ was wrongful.

The Native Commissioner ruled:-

(1) That the doctrine of set-off forms no part of the Native law as known in Natal and Zululand.

(2) That the debts were not of the same kind.

(3) That Defendant's debt had not been liquidated.

Now section 11(1) of Act 38 of 1927 reads:-

"Notwithstanding the provisions of any other law, it "shall be in the discretion of the Courts of Native "Commissioner, in all suits or proceedings between Natives "involving questions of custom followed by Natives, to "decide such questions according to the Native law applying "to such except in so far as it shall have been repealed, "etc."

The claim in this action does not involve "questions of customs followed by Natives" nor is it in respect of matters "peculiar to Native custom." It concerns purely a matter of procedure and the law to be applied is the common law. This matter was fully dealt with in the case of John Nzalo vs. Lydia Maseko, (N.A.C. (T. and N.) Selected Decisions, July, 1930 - December, 1931, Case No. 14).

The value of the beast had been fixed at £4.10.0 by the judgment of the Court and the debt owed by Defendant was therefore liquidated.

The only other point to be considered is whether the debts are of the same kind.

In.....

In the case of Mosenthal Bros. vs. Coghlan & Coghlan, 5 H.C.G. 87, a writ of arrest against F. was obtained at M.'s instance in respect of a debt due upon liquid documents, but was thereafter discharged with costs. F. refused to set off the costs against the larger sum due by him to M. on the liquid documents, and through his Attorney C. took out a writ for the amount. M. paid the amount and thereafter applied for an order on C. to refund the amount. It was held that the writ was wrongly taken out and that an action to restrain the execution would probably have been successful, as the judgment debt was extinguished by compensation but that as F. had not been joined the application must be refused.

In the cases of Van Niekerk's Trustees vs. Tiran, 1 S.C. 358, and van Standen vs. Hopkins, 3 S.C. 81, it was held that there was no necessity of first paying taxed costs, as they were ipso jure set off against the original debt.

On the authority of these cases it is clear that the judgment for costs was set off against the principal debt, and thus the writ was wrongly taken out.

Plaintiff is entitled to recover damages. He claims £14 but has failed to prove that this was the actual value of the four head of cattle he sold. All he is therefore entitled to recover is the amount paid by him to the Messenger namely £5.5.0.

The appeal is allowed with costs. The judgment of the Native Commissioner is set aside and judgment is entered for Plaintiff for £5.5.0 and costs.

CASE NO. 8.

MAGCEKENI MHLONGO VS. MAGWABABA NZUZA.

ESHOWE. 16th April 1935. Before F.H. Brownlee, President, R.W. Hancock, M.L.C. Liefeldt, Members Native Appeal Court, (Natal and Transvaal Provinces).

Damages for slander - Judgment against wife "duly assisted by husband" - Liability of husband - Native custom.

An appeal from the Court of Native Commissioner, Entonjaneni.

UNDER NATIVE LAW AND CUSTOM A HUSBAND IS LIABLE FOR THE TORTS OF HIS WIFE. THE FACT THAT HE IS CITED AS "ASSISTING HIS WIFE" DOES NOT FREE HIM FROM LIABILITY IN ANY JUDGMENT THAT MAY BE GIVEN.

From the record it appears that Respondent, Magwababa, sued Makundu Majola "duly assisted by her husband Magcekeni Mhlongo" on a claim for £15, damages in respect of a slanderous statement alleged to have been made by the wife, Makundu.

The.....

The Native Commissioner entered a judgment in favour of the Respondent, Magwababa, for £10 and costs. A writ was issued in consequence of this judgment upon which certain cattle, the property of the Appellant, were attached and sold.

Thereafter the Appellant sued the Respondent for the sum of £12 18.10, being the amount realised in respect of the sale in execution "of certain cattle the property of the Plaintiff (Appellant) wrongfully and unlawfully attached at the instance of the Defendant (Respondent) in the case No. 43/30 wherein Defendant was given judgment against Plaintiff's wife, Makundu Majola." The summons goes on to state:-

"The said cattle so attached and sold were the property of the Plaintiff who had not assumed liability for the judgment against his wife."

A statement of facts admitted by both parties was filed in which it is stated, inter alia, "Magcekeni now claims from Magwababa ..... the value of cattle sold in execution under the judgment ..... on the ground that they are his property and that he is not responsible or liable under the judgment given against his wife. This is the point for the decision of the Court."

In this action the Native Commissioner entered judgment for Defendant with costs and it is against this judgment that an appeal has now been lodged, the grounds of appeal being that:-

(1) The judgment is against the weight of evidence and bad in law.

(2) That in the case of Magwababa Nzuza versus Makundu Majola, duly assisted by Magcekeni Mhlongo, No. 43 of 1930, the said Magcekeni Mhlongo, being the husband of the said Makundu, was joined solely to give the said Makundu "locus standi in judicio" and cannot be made liable on any judgment given against the said Makundu.

(3) Alternatively that the Native Commissioner, on his facts found proved and reasons for judgment, is wrong in assuming that Appellant tacitly acquiesced in and connived at the defamatory statement made by the said Makundu of and concerning the Respondent.

In considering this case the Court must naturally closely associate the agreement of the parties with the grounds of the appeal. In the facts admitted by the parties the issues are narrowed down to one cardinal point. The grounds of appeal elaborate the Appellant's contention on that point.

To the mind of this Court it seems that the questions to be considered are: Whether the Appellant Magcekeni is to be regarded as a mere figurehead in the original suit, in which he responded to the claim, solely in order to give his wife, the admitted tort feasor, legal status in Court, or whether in accepting citation he undertook, as a co-defendant, full liability in respect of any judgment that might be delivered;

and.....

and, finally, whether such liability might rightly be attached to him.

There are innumerable legal decisions based upon Native law and custom which show that a husband is liable for the torts of his wife, not merely as a figurehead in order to give her legal status, but also as the property holder from whose possessions restitution may be made to the person wronged.

Accepting the many dicta laying down that a married woman (except under particular circumstances) may hold no property, the question arises as to whence the sufferer is to obtain redress if the wife from her position as a minor and so without property is unable to make amende profitable to the one she may have wronged.

In the matter under consideration the judgment was given against the parties the woman being "duly assisted by her husband." In our opinion the words "duly assisted" impose on the husband an obligation to defend the action if there is a defence and to meet full liability should that defence fail (see case of Mlondleni vs. Magcaka, 1929 N.A.C. (C. & O.) 10).

If the contention of the Appellant that he is not personally liable for the torts of his wife is to be accepted by this Court then we are to act counter to an accepted and consistently applied principle of Native law.

This Court sees no reason to differ from the judgment of the Native Commissioner which is based upon sound principles of Native law and we hold that, in circumstances such as this record discloses, the husband is liable for the torts of his wife, and that the fact that he is cited as assisting his wife does not free him from liability in any judgment that may be given.

The judgment of the Native Commissioner is sustained and the appeal is dismissed with costs.

LIEFELDT (dissenting).

With all due deference to and respect for the learned President and my brother Hancock, I feel constrained to dissent from their views in this matter.

In my opinion the question of the liability of a husband for the torts of his wife is not an issue in the case before the Court. The Plaintiff (now Appellant) claimed "the sum of £12.18.10 being the amount realised under the sale in execution on the 4th December, 1934, of certain cattle the property of the Plaintiff, wrongfully and unlawfully attached at the instance of the Defendant (now Respondent) in the case No. 43/30, wherein Defendant was given judgment against Plaintiff's wife Makundu Majola."

In the case referred to one Magwababa Nzuza obtained judgment against Makundu Majola duly assisted by Magcekeni Mhlongo for the sum of £10 as damages for defamation and costs.

The Native Commissioner erred in considering the evidence recorded in that action for the purpose of giving a

ruling.....

ruling on the husband's liability in the present case. The only issue before him was whether a writ of execution could be issued against Appellant in his personal capacity on a judgment given against his wife duly assisted by him as her husband.

In Van Zyl's Judicial Practice, Vol. I, 4th edition, p. 264, he states, "If a judgment has been obtained against a person in his representative capacity the writ should be issued against him in that capacity, unless the Court otherwise specially directs or makes him personally liable on action brought."

Now there is clearly a distinction between a wife being sued assisted by her husband and a husband being sued in his capacity as husband. In the former case the wife being a minor in the eyes of the law, cannot sue or be sued unassisted. In the latter case the husband is sued in his capacity as husband because of his liability for the torts of his spouse.

In the case of Mlondleni vs. Magcaka, supra, the Defendant was sued "in his capacity as husband and guardian of his wife". The wife was not sued assisted by her husband as in this case.

The difference between these two expressions is well illustrated in the case of spouses married out of community. The wife is individually and separately responsible for defamation uttered by her and her separate estate alone is liable for damages. The wife must, however, be sued assisted by her husband - (Nathan, Law of Defamation, p.161). It is untenable to hold that a judgment given against her assisted by her husband in such a case, is executable against the husband's property.

The distinction is further illustrated by sections 79 and 141(3) of the Natal Code of Native Law. The former provides that a woman suing for divorce must "be assisted" in the action by her father, protector, etc., while the latter requires the person committing the delict to be sued "jointly" with his father, guardian or kraal-head, as the case may be.

If it was intended to join the husband in this action he should have been sued in his capacity as husband and guardian of the wife. Whether this was the intention or not it is not for this Court to say. We must accept the position as we find it. The judgment was given against the wife duly assisted by her husband and the husband cannot be made personally liable on the judgment.

CASE NO. 9.

JACOB MAJOZI VS. A.G. MUDE.

MARITZBURG. 29th April, 1935. Before F.H. Brownlee, President, B.W. Martin, H.G.W. Arbuthnot, Members Native Appeal Court (Natal and Transvaal Provinces).

Lobolo.....

Lobolo - Legality of payment to Exempted Native.

An appeal from the Court of Native Commissioner, New Hanover.

AN AGREEMENT TO PAY DOWRY TO AN EXEMPTED NATIVE, IS ENFORCEABLE NOTWITHSTANDING THE FACT THAT THE PROMISOR ENTERS INTO A CIVIL MARRIAGE WITH THE DAUGHTER OF THE EXEMPTED NATIVE.

Mude sued Majozi in the Court of the Native Commissioner, New Hanover, for the delivery of ten head of cattle or their value being the lobolo agreed upon and due to Plaintiff by Defendant in respect of the marriage of his (Plaintiff's) daughter Mabel Clementina to Defendant.

The Defendant pleaded that he was not indebted.

The Native Commissioner entered judgment for Plaintiff for ten head of cattle or their value £50, less two head, or their value £10, paid on account, together with costs.

Defendant has lodged an appeal with this Court against the whole of the Native Commissioner's judgment on the grounds that:-

(a) The Court wrongly held that Respondent, being an exempted Native, was entitled to receive lobolo for his daughter, Mabel Clementina.

(b) Even if Appellant promised to pay lobolo, such promise is unenforceable, being illegal.

(c) The judgment was against the weight of evidence.

It appears, from the record, that Respondent's daughter, Mabel, was married to Appellant in accordance with Christian rites; that, in the declaration antecedant to the marriage, it was stated that ten head of cattle and a ngqutu beast had been paid as lobolo; that the cattle had been pointed out but not actually handed over to Respondent, and that Respondent is exempted from the operation of Native law.

Counsel for Appellant (Defendant in the Court below), maintained that inasmuch as Respondent (Plaintiff in the Court below) was a Native exempted from the operation of Native law, he could not succeed in a claim for lobolo, and "even Defendant's promise to pay does not alter the position."

It is clear that there was an agreement on the part of Appellant to pay lobolo in respect of the marriage and that the lobolo cattle were actually pointed out, but that, owing to veterinary restrictions in regard to the removal of cattle, the animals were not actually handed over.

The Native Administration Act (No. 38 of 1927), section 11(1), specifically lays down that the custom of lobolo is not repugnant to nor opposed to principles of public policy or natural justice. It follows, therefore, that an agreement to pay dowry in respect of marriages contracted by Natives in accordance with Christian rites is not repugnant to public policy or morals.

In.....

In the opinion of this Court payment of lobolo was agreed upon by the parties and, notwithstanding the facts that Respondent is an exempted Native and that the marriage was contracted in accordance with civil law, the agreement is enforceable in the Court of the Native Commissioner (see case of Florence Mdhlalose vs. Benjamin Mabaso, 1931 N.A.C. (T. & N.)).

The judgment of the Native Commissioner is confirmed and the appeal is dismissed with costs.

CASE NO. 10.

GEDE NZIMANDE VS. MVELAPANTSI DHLAMINI.

MARITZBURG. 30th April, 1935. Before F.H. Brownlee, President, B.W. Martin, H.G.J. Arbuthnot, Members Native Appeal Court (Natal and Transvaal Provinces).

Lobolo - Agreement made in East Griqualand for number in excess of ten head of cattle - Enforceable in Natal.

An appeal from the Court of Native Commissioner, Bulwer.

A CONTRACT "PROPTER NUPTIAS" TO PAY DOWRY IS A SEPARATE CONTRACT TO THE ONE OF MARRIAGE AND IS ENFORCEABLE IN NATAL ALTHOUGH MADE IN EAST GRIQUALAND.

In this case which comes from the Court of the Native Commissioner, Bulwer, the Plaintiff sued the Defendant for thirteen head of cattle or their value £58.10.0 being balance of lobolo cattle due to Plaintiff by Defendant in respect of the marriage of Plaintiff's sister Nomakafula to Defendant.

(The Plaintiff is a resident of East Griqualand (Cape). Defendant is a resident in the Province of Natal).

A plea of "not indebted" was entered.

The Native Commissioner gave judgment "for Plaintiff as claimed with costs. Judgment of Chief's Deputy Mpengwana confirmed."

Against this judgment appeal has been noted on the grounds:-

1.(1) That the evidence adduced at the trial proved that the agreement to pay lobolo was effected in the District of Polela (Natal) and not in East Griqualand (Cape).

(2) That even if the finding of the Native Commissioner on this point is correct, such agreement is illegal and unenforceable having regard to the provisions of sections 177, 178, 179, 180 and 182 of the Natal Code of Native Law (1891), in that Plaintiff seeks to recover cattle in excess of the number limited by the

Natal.....

Natal Native Code.

2. The Appellant contends that the law to be applied is the law in force in the Defendant's domicile.

From the record it is clear that the late Fiyasizwe of whom the Respondent is the heir was domiciled in East Griqualand, Cape Province, that the negotiations for the marriage of Respondent's sister Nomakafula took place at the kraal of the late Fiyasizwe, that in the marriage settlements it was agreed that lobolo should be paid in respect of the marriage of Appellant to Nomakafula, and that the agreement took place in East Griqualand.

From the certificate of marriage it appears that eight head of cattle were paid as lobolo and that twelve cattle and a ngqutu beast (thirteen head) remained to be paid.

Some attempt has been made to show that the marriage register was incorrect and that Appellant was not party to it but on the facts before it this Court sees no reason to believe that the entries in the register were out of order. It concludes that the entries were in accordance with the agreement arrived at in East Griqualand by Appellant with the father of the bride.

This Court finds that there was an agreement on the part of the Appellant to pay twenty head of cattle and the ngqutu beast in respect of his marriage to Respondent's sister, that agreement was arrived at in the Cape Province and notwithstanding the fact that the marriage subsequently took place and was registered in Natal, the contract propter nuptias to pay dowry - a separate contract to the one of marriage - is enforceable in Natal. The agreement to pay dowry up to the number stated is a legal contract in the Cape Province and it is not stultified by the laws operative in Natal which limit the number of cattle that may be paid, the laws of Natal obviously being intended to apply to residents of Natal.

In coming to these conclusions the Court has in the main been guided by the dictum in the case of Baliso and Meleni Thomson vs. Sipaji Zeka, 1930 2 N.A.C. (C. & O.) in which it was laid down "that where the law of the Plaintiff's domicile differs from that of the Defendant ..... there is nothing to prevent the parties from entering into an agreement to pay the dowry fixed by the custom obtaining in the Plaintiff's place of abode."

The judgment of the Native Commissioner is confirmed and the appeal is dismissed with costs.

CASE 11.

MANKEBA ZULU VS. ZIMBUBE ZULU.

MARITZBURG. 30th April, 1935. Before F.H. Brownlee, President, B.W. Martin, H.G.J. Arbuthnot, Members Native Appeal Court (Natal and Transvaal Provinces).

Appeal.....

Appeal from Chief's Court.

An appeal from the Court of Native Commissioner, Nongoma.

WHERE AN EXTENSION OF TIME, WITHIN WHICH AN APPEAL FROM A CHIEF'S JUDGMENT MAY BE PROSECUTED, IS GRANTED BY A NATIVE COMMISSIONER, SUCH FACT SHOULD BE RECORDED.

This case comes from the Court of the Native Commissioner, Nongoma.

It was first heard before the Chief Bhokwe, was heard on appeal before the Native Commissioner and it now comes before this Court.

The main ground of appeal is "that the whole of the proceedings in the Native Commissioner's Court were void ab origine owing to Rule No. 5 of the Regulations for Chiefs' Civil Courts not having been complied with."

The Chief gave judgment in the matter on 30th January, 1934; an appeal against that judgment was noted on 30th July, 1934. In his reasons for judgment the Native Commissioner states an extension of time within which to appeal was granted by him, but apart from this statement there is nothing whatsoever on the record to show that an application for extension of time was made or granted.

It is true there is a statement by the Respondent that he delayed lodging his appeal to the Native Commissioner owing to illness but this does not constitute an application for an extension of time.

Applications of this nature and rulings thereon should obviously form part of the written record. It is not a sufficient compliance with the rule for a Native Commissioner informally to grant without record an extension of time within which to appeal from the judgment of a Native Chief.

The appeal is allowed with costs. The judgment of the Native Commissioner is set aside and is altered to "judgment for the Defendant with costs."

CASE NO. 12

KLEINTJIE NTANANE VS. ISHAYELI NKOSI.

MARITZBURG 24th July, 1935, before F.H. Brownlee, President, B.W. Martin, C.A. Mack, Members Native Appeal Court (Natal and Transvaal Provinces.

Native Custom - "Endisa" or "ubulunga" custom - Free Gift - Section 142 Natal Native Code, 1891.

An appeal from the Court of Native Commissioner, Ladysmith.

WHERE.....

WHERE A BEAST WAS VARIOUSLY REFERRED TO AS "UMAMBO" OR "UMOBO" BEAST THE COURT ASSUMED THAT THESE TERMS CORRESPOND WITH "ENDISA" BEAST IN NATAL AND "UBULUNGA" IN THE TRANSKEI.

Plaintiff, Kleintjie Ntamane, claimed from the Defendant, Mshayeli Nkosi, in the Court of the Assistant Native Commissioner, Ladysmith, the return of a certain cow with its progeny of three or their value, £11.10.0.

Plaintiff alleged in his summons that he was the eldest son and heir in the great house of the late Mgqumo Ntamane, that his father had lent Defendant a cow with its calf, the cow and calf "being stock belonging to and ex his great house", that the cow had since had four progeny, one of which was killed.

Defendant pleaded "not indebted."

The Assistant Native Commissioner delivered judgment "in favour of Defendant with costs."

Against this judgment the Plaintiff has appealed on the grounds that:-

(a) The judgment was against the weight of evidence and the probabilities.

(b) The Native Commissioner erred in his judgment in that "even if the Defendant's contention that the original beast was a beast given to him and/or his wife to enable her to "drink milk" at her husband's kraal be correct (which is denied), then under Native Law and Custom, the beast nevertheless remains the property of the Plaintiff's late father and the Plaintiff is entitled to the said beast and its progeny."

The original cow, the subject of this action, is variously referred to in evidence as the "Umabo" or "Umobo" beast, terms which it is assumed correspond with "Endisa" generally used in Natal and referred to in the Transkeian Native Territories as "Ubulunga."

The custom of "endisa" or "ubulunga" varies with different tribes, but the essentials are the same.

Plaintiff (Appellant) contended that the original cow was lent to Defendant's (Respondent's) wife and not given as an 'Umabo' beast, and so sought to prove that something unusual in Native custom had occurred.

A beast known as "Ubulunga" is one presented to the wife at the time of her marriage, it is selected from among the sacred cattle of her people, and represents to her the spirits of her ancestors. From the brush of its tail hairs are plucked and fashioned into necklaces which form charms potent to protect the wife and her children from evil spells and the plucking of the hairs is a symbol of sacrifice to propitiate the spirits. The husband has no part nor lot in this beast and its protective properties do not extend to him.

In.....

In the opinion of this Court the Appellant has sought to prove the improbable which he has failed to do; the probabilities are strongly in favour of Respondent whose witnesses state definitely that the original cow was a gift to Respondent's wife which we believe it to have been and this would be in accordance with the custom of "endisa"; vide section 142 of the Natal Code of Native Law of 1891 which was in force at the time the cause of action arose.

In the case of Nomzwezwe Ngcobo vs. Chief Mlamula Ngcobo, N.H.C. 1928, it was stated by Mr. Justice Leslie, referring to gifts of cattle to a woman on her marriage: "This custom is so universally followed that there is a strong presumption in favour of the appellant's case that the cow was a free gift, made outright to appellant's mother's hut, and it is for the respondent to disprove that presumption with the clearest evidence, this he signally failed to do." This is exactly the position in the present case.

The judgment of the Native Commissioner is confirmed and the appeal is dismissed with costs.

CASE NO. 13.

FRANS SHONGWE VS. GRASMAN SHONGWE.

PRETORIA. 9th September, 1935. Before B.W. Martin, President, C.J. Sweeney, J.H. Brink, Members Native Appeal Court (Natal and Transvaal Provinces).

Procedure - Exception - Cause of Action.

An appeal from the Court of Native Commissioner, Wakkerstroom.

WHERE ANY OBSCURITY EXISTS IN THE SUBSTANCE OF A SUMMONS, NATIVE COMMISSIONERS SHOULD CAUSE THE POSITION TO BE CLARIFIED BEFORE GIVING JUDGMENT. NATIVE COMMISSIONERS SHOULD DISCOURAGE, AS FAR AS POSSIBLE, THE PRACTICE OF ANSWERING A PLAINTIFF'S CLAIM BY WAY OF EXCEPTION.

Plaintiff's claim as set out on the face of his summons is as follows, viz:-

> "The return of 45 head of cattle or payment of their "value £135 and 45 goats or payment of their value "£22.10.0 and costs.
>
> "Particulars on back hereof."

On the reverse side of the summons the following particulars are shown, viz:-

(1)

"All parties to this case are Natives of this District.

(2).....

(2)

"Plaintiff's father was Kandeya Shongwe, who died in 1922, and Plaintiff became his heir.

(3)

"Defendant is the brother of Kandeya, and when Plaintiff's mother died, Defendant took possession of the animals claimed, saying he would look after them until Plaintiff was a major.

(4)

"When Plaintiff became of age, Defendant repeatedly put Plaintiff off, when a demand for the return of the animals was made until finally he denied liability."

On the back of the summons there is also an endorsement to the effect that the summons was served on Defendant personally by Plaintiff who certifies to having explained the summons to him.

The summons was prepared by Plaintiff's Attorney.

To this summons written exception was taken in the following terms:-

"Defendant's Exception to Plaintiff's Summons.

"The Defendant excepts to Plaintiff's summons and says that it is bad in law and discloses no cause of action inasmuch as:

"(a) The claim in the summons is based on the alleged inheritance from a deceased native named Kandeya Shongwe whereas there is no allegation in the summons that Plaintiff sues in his capacity as Executor in the Estate of the late Kandeya Shongwe by virtue of Letters of Administration issued to him by the Master of the Supreme Court or any other competent authority, nor does the summons allege that the said late Kandeya Shongwe was a native married according to Native law and custom and that Plaintiff according to Native law and custom is the legal and recognised heir to the said deceased and sues on behalf of the said Estate and in his capacity as the legal and recognised heir to the estate of the said late Kandeya Shongwe.

"(b) There is no allegation in the summons that the cattle and goats claimed by the Plaintiff ever did belong to Plaintiff's late father, the said Kandeya Shongwe, or that they were at any time in the possession of the said deceased, or that the Defendant at any time took delivery thereof from the said deceased or that the said stock were at any time in the possession of the Plaintiff himself.

"Wherefore the Defendant prays that the Plaintiff's claim and summons may be dismissed with costs."

In addition to these exceptions a written plea and a counterclaim were filed, which, for the purposes of this case, need not be discussed now.

Incidentally, it may be mentioned that neither the exceptions nor the plea and counterclaim bear any date and

it.....

it is presumed that they were only filed on the return date of the case.

During the hearing of argument on the exceptions Plaintiff's Attorney applied for leave to amend his summons by adding to the particulars already supplied the following clauses, viz:-

(1)

"That the estate was not reported to the Master and that Plaintiff is suing as heir.

(2)

"The cattle were taken away by Defendant from the possession of Kandeya's widow and that Defendant took delivery thereof."

The application for amendment was not opposed by Defendant's Attorney and the additions were allowed.

After argument, and, according to the Native Commissioner's reasons, while he was delivering his judgment on the exceptions, Plaintiff's Attorney applied for leave to make a further amendment of the particulars of summons by adding a clause to the effect that Plaintiff's parents had contracted a customary union. This application was disallowed and the Defendant's exceptions were upheld with costs and summons dismissed.

In seeking to support the Native Commissioner's finding, Defendant's Attorney relied mainly on the omission from the summons of specific particulars regarding the nature of the union between the parents of Plaintiff, and argued that by reason of such omission it was not possible for his client to know in what capacity Plaintiff claimed, i.e.: whether he claimed as heir to parents united in a customary union, or by virtue of some testamentary disposition or at Common Law.

The Court is not able to uphold this contention. It is true that the Plaintiff's claim is not as clearly set out as it might have been, but it is our opinion that the particulars given in the original summons were, in themselves, sufficient to indicate to the Defendant what case he had to meet, particularly as the parties are related to each other, and Defendant must have known the Plaintiff's status in regard to this claim. That such was the case is evidenced by the fact that simultaneously with the filing of the exceptions the Defendant was able to file a written plea to the summons and a counterclaim.

In any case if any further obscurity had existed as regards the standing of the Plaintiff it was the duty of the Native Commissioner to have caused the position to be clarified before he gave his decision.

Such action would not have resulted in prejudice to anyone and the procedure would have been in accordance with the spirit and intention of Act 38 of 1927 which, undoubtedly, contemplated the simplification, as far as possible, of the proceedings in the Courts of Native Commissioners, the avoidance of the legal niceties and technicalities that obtain in other more highly specialised Courts, and the lessening of the expense of litigation.

It.....

It is true that the practice of answering a Plaintiff's claim by way of exception has been adopted in the lower Courts in the past and that such procedure has been accepted by the Native Appeal Courts without comment in several cases that have come before them.

This tendency to depart from the simple procedure alluded to above is regrettable and in the opinion of this Court it should be discouraged as far as possible by Native Commissioners. The mere omission from the rules of Native Commissioner's Courts of any provision for the taking of exceptions and objections in Native Courts is sufficient indication, by itself, of the intention of the legislators in that regard.

Native Commissioners should, therefore, endeavour to ensure that the trial of cases between Natives shall be conducted in their Courts in as simple a manner as possible, care being taken to avoid and eliminate the complicated forms of pleading in vogue in Magistrate's Courts.

The appeal is upheld with costs and the judgment of the Native Commissioner altered to read: "Exception dismissed with costs."

CASE NO. 14.

BANGANE VS. MALESELA TEFU.

PRETORIA. 9th September, 1935. Before B.J. Martin, President, C.J. Sweeney, J.H. Brink, Members Native Appeal Court (Transvaal and Natal Provinces).

Bapedi Tribe - "Mafisha" custom - Herding fees - Review.

An appeal from the Court of Assistant Native Commissioner, Bochem.

UNDER THE "MAFISHA" CUSTOM OF THE BAPEDI TRIBE THE OWNER OF CATTLE IS LIABLE FOR DIPPING AND GRAZING EXPENSES, BUT NOT FOR HERDING FEES.

This is an appeal against the judgment of the Assistant Native Commissioner at Bochem in whose Court Appellant claimed from Respondent fifty head of cattle or their value £250, alleging that many years ago she had lent £50 to Respondent's father in return for which the latter had pointed out seven head of cattle which he undertook to retain and look after free of charge; that subsequently Respondent's father died and that Respondent became his heir and thus liable to the Appellant for the delivery of the cattle in question with increase or their value.

Respondent in reply to the claim admitted that he inherited his father's estate; he admitted also the transaction between his father and Sentumulo, the husband of Appellant, but alleged that he had already returned 13 cattle and denied

that he was liable for any more. He counterclaimed against the said Sentumulo in the sum of £220 being for grazing, herding and dipping expenses incurred in connection with the cattle while under his care.

The Appellant repudiated the counterclaim alleging that the sum of £8 had been paid for dipping fees.

It transpires from the evidence that the dispute between the parties was not correctly set out in the pleadings and that actually Appellant claimed from the Respondent only 7 head of cattle for 6 of which the latter admitted liability.

The Native Commissioner gave judgment for Plaintiff-in-convention (Appellant) for 6 head or their value £30, making no order as to costs, and for Plaintiff-in-reconvention (Respondent) for £47.7.6 and likewise made no order as to costs.

Against this decision an appeal has been noted in the following terms, viz: "Be pleased to take notice that the Plaintiff hereby notes an appeal to the Native Appeal Court against the judgment as a whole of this Court in the matter delivered at Bochem on the 11th January, 1935."

No grounds of appeal have been furnished, the Appellant purporting to act in terms of Rule 10(b) of the Native Appeal Court Rules. As pointed out by this Court in the case of Gabriel Nkomane vs. Joel Moeketsi 1930 N.A.C. (N. & T.) and Blaine, 99, it is desirable that a practitioner lodging an appeal on behalf of an Appellant who was not represented in the lower Court should state the grounds of appeal clearly and specifically and not rely on the proviso of Rule 10(b).

In this Court is was intimated that the appeal is not in fact against the whole judgment but against the decision on the counterclaim only, the ground being that it was bad in law in that the evidence establishes that Respondent held the cattle under the custom of "Mafisha" in terms of which, it is contended, herding fees are not claimable.

The Mafisha custom is one whereby the person with whom the cattle are placed may use them but he has no claim to any of the increase and he must in due course account to the owner for all cattle "fishaed" together with the progeny. The owner of the cattle "fishaed" (according to Harries, p.132), is liable for dipping and other expenses, but not for herding fees.

In the present case it is true that the Respondent in his counterclaim demands grazing, dipping and herding fees but it is clear from his evidence that he claims only grazing and dipping fees and that the amount awarded to him is in respect of these expenses and not for herding fees. Assuming therefore that the evidence does establish that the cattle were held under the "Mafisha" custom the Respondent would still be entitled to grazing and dipping fees. As he was awarded these expenses, and not herding fees, the appeal therefore on this ground cannot be sustained.

This conclusion, however, does not entirely dispose of the matter in view of the irregularities disclosed in the proceedings.

The.....

The Plaintiff (Appellant) is a married woman whose husband is alive but the action is brought in her own name unassisted, on a contract which is found to subsist not between herself and the Respondent but between the latter and her husband.

Furthermore, the counterclaim in the matter is directed against the Appellant's husband who, however, is not joined as a party to the action in any way, but merely appears as a witness for the Appellant.

Although these defects involve fundamental principles of law and procedure they stand uncorrected in the lower Court and have not been raised on appeal.

Clearly, however, they are of such a vital character as to nullify the entire proceedings.

The effect of the judgment is that a married woman who has no capacity to sue has obtained a judgment in her favour for property which she cannot hold in her own name while a judgment has been given against her on a counterclaim to which she was not, and could not be, a party, and which in law is therefore unenforceable.

In view of these irregularities, this Court has come to the conclusion that the judgment in the lower Court was bad ab origine and we find it necessary to exercise the powers concerred on us by Section 15 of the Native Administration Act. In terms of that Section this Court has the power, inter alia, to review, set aside, amend or correct any order, judgment or proceeding of a Native Commissioner's Court provided that no judgment or proceeding shall, by reason of any irregularity or defect in the record or proceedings be reversed or set aside unless it appears to the Court of Appeal that substantial prejudice has resulted therefrom.

As this Court feels that substantial prejudice will result by quashing the proceedings entirely, having regard to the fact that but for the irregularities mentioned the Native Commissioner's judgment on the facts and in law is otherwise correct, the judgment is set aside and the proceedings are returned to the Native Commissioner, permission being granted to the husband of the Appellant, tc apply, if he so desires, to be substituted on the record as plaintiff-in-convention and defendant-in-reconvention, thereafter the Native Commissioner to pronounce a fresh judgment.

No order as to costs of appeal.

overruled by Liyila Mswili v. Ngqiqi Mvili 1938 N.A.C. P. 239
Case No. 85

CASE NO. 15.

NB.

APRIL MALULEKA VS. THOMAS MAVELA.

PRETORIA. 10th September, 1935. Before B.W. Martin, President, C.J. Sweeney, J.M. Brink, Members Native Appeal Court, (Transvaal and Natal Provinces).

Interpleader - Property attached in possession of claimant - onus.

An.....

An appeal from the Court of Native Commissioner, Nylstroom.

IN AN INTERPLEADER ACTION THE ONUS OR BURDEN OF PROOF IS ON THE CLAIMANT.

In this matter the Appellant claimed certain four head of cattle which had been attached by the Messenger of the Court in execution of a judgment of the Native Commissioner's Court in favour of the Respondent.

The Respondent resisted the claim and the Native Commissioner after hearing evidence dismissed the Appellant's claim and declared the cattle to be executable, with costs.

An appeal has been noted against this judgment on the following grounds:-

"1. That the judgment is against the weight of evidence, and

"2. That the judgment is bad in law in that the Native Commissioner erroneously held that the onus rested on the claimant whereas such onus rested on the judgment creditor."

It appears from the record that the question upon whom the onus rested was raised at the outset and that the Court after argument ruled that the Appellant should commence.

At this stage it will be convenient to deal with the second ground of appeal because if the Native Commissioner's contention that the onus rested on the Claimant is correct, then it must be determined whether or not the evidence adduced by him has discharged that onus.

It is settled law that in interpleader actions the general rule is that the burden of proof is on the Claimant. It is for him to prove that he is the owner of the property. The onus may, however, be affected by surrounding circumstances as the following cases will show:-

In Mulumbe vs. Jussob, 1927 T.P.D. 1008 the property was attached in the possession of the Claimant and the Court held that possession raised a presumption of ownership and that the onus was on the Execution Creditor to prove that Claimant was not the owner.

In Van der Merwe vs. Olemsdahl, 1919 T.P.D. the Court went further and held that where under a writ of execution an attachment is laid on property in the possession of the debtor which had manifestly recently belonged to a third person the onus is on the Judgment Creditor to prove that the property belonged to the debtor.

It would appear, therefore, that this vexed question of onus in interpleader actions must necessarily depend on the circumstances of each case.

In the action now before this Court it is common cause that the cattle at the time of the issue of the summons

in.....

in the original case were in the possession of the Judgment Debtor and that at some later date they were removed to the Claimant's kraal. It is also common cause that the cattle had been in the possession of the Judgment Debtor for some years prior to the issue of the summons.

It must be noted that in Van der Merwe's case it was held that the onus was on the Judgment Creditor notwithstanding the accepted general rule or the fact that the cattle were attached in the possession of the Judgment Debtor. Therefore conversely it must follow that "a fortiori" will the onus be on the Claimant in accordance with the general rule if it be proved that cattle although attached in the possession of the Claimant were shortly before attachment in the possession of the Judgment Debtor.

Taking all the circumstances into consideration, this Court comes to the conclusion that the Native Commissioner rightly held that the onus was on the Claimant of proving that the cattle in dispute were his property.

Having arrived at this conclusion the question whether the Claimant has discharged that onus remains to be determined. The Native Commissioner has discussed the evidence in his reasons for judgment and no good ground has been shown why this Court should disagree with the conclusions he has reached.

He says: ".... In arriving at this conclusion the Court had to sift the evidence very carefully and consider the relationship of the parties. In the first place the Claimant is the son-in-law of the Execution Debtor and he admits the cattle at the time of attachment were at Piet Sibambo's kraal although under his control and under cross-examination stated he had removed the cattle to his kraal after the issue of the summons in the previous case and further stated 'Piet told me to take away my cattle as Execution Creditor was coming to fetch his cattle'." The Native Commissioner had the witnesses before him and is the best judge of the degree of credibility to be given to the evidence.

After due consideration of the evidence and the probabilities, this Court comes to the conclusion that the claimant has failed to establish his claim.

The appeal is dismissed with costs.

CASE NO. 16.

ALFRED KOZA VS. THOMAS ZULU.

MARITZBURG. 25th October, 1935. Before B.W. Martin, President, C.W. Crawford, J.T. Boast, Members Native Appeal Court, (Natal and Transvaal Provinces)

Damages - Pregnancy - Divorced Woman - Natal Native Code 1932.

An appeal from the Court of Native Commissioner, Maritzburg.

WHERE.....

WHERE A MARRIED WOMAN OBTAINED A DIVORCE IN DECEMBER AND GAVE BIRTH TO A CHILD IN JUNE OF THE FOLLOWING YEAR, ALTHOUGH SHE HAD LIVED APART FROM HER HUSBAND FOR TWO YEARS, THE CHILD IS REGARDED AS BELONGING TO THE HUSBAND. THE WOMAN'S FATHER HAS NO LOCUS STANDI IN AN ACTION FOR DAMAGES.

This is an appeal from a judgment of the Court of the Native Commissioner, Pietermaritzburg, in favour of Respondent against Appellant for one beast or its value, £5, damages for pregnancy of Respondent's daughter, Martha, no order being made as to costs.

It is common cause that Respondent's daughter, Martha, gave birth to a child on the 20th June, 1935, and that she had obtained a divorce from her husband in December, 1934, after having lived apart from him for two years. The Native Commissioner accepted her statement that Appellant had caused her pregnancy and gave judgment as indicated.

The ground of appeal was as follows.-

"(1) That the judgment was against the weight of evidence, in that the Plaintiff in the Court below failed to prove that the Defendant was the father of the child."

At the hearing of the appeal, Mr. Brokensha, who appeared for Appellant, obtained permission to file the following further grounds of appeal:-

"(1) That Respondent had no locus standi to sue.

"(2) That the evidence of Plaintiff's daughter was insufficient to rebut the presumption 'Pater est quem nuptia demonstrant'."

The judgment appears to have been based on the provisions of Section 137(2) of the Natal Native Code of 1932 which reads as follows:-

"Any person having illicit intercourse with a divorced woman or widow as a result of which a child is born shall be liable in damages to her father or guardian, such damages not to exceed one beast in respect of each child so born. In the event of a subsequent customary union between the parties, any payment of damages shall be regarded as forming part of the lobolo."

In this case, however, the father of the child born did not have illicit intercourse with a divorced woman or widow as the intercourse must have taken place about September, 1934, when the woman Martha was still a married woman.

Section 32(c) of the Code provides as follows.-

"A child born of a divorced woman within ten months of her divorce becomes a member of the family of such woman's previous husband."

This means that the child born to Martha on the 20th June, 1935, must be regarded as belonging to her husband and

it is difficult to understand how Respondent can maintain an action for damages in respect of a child of which he cannot become guardian.

Mr. Davis, who appeared for Respondent, argued that the cause of action arose, not from the pregnancy of the woman but from the birth of the child as Respondent would have to deduct a beast on account of the child from the number of cattle otherwise claimable by him as lobolo for the woman in the event of her remarriage.

Respondent states that he paid back four head of cattle to Martha's husband by order of Court. It is not understood why he was ordered to make this refund. In the last paragraph of his evidence he distinctly stated that Martha was the Plaintiff in the divorce action. It must be assumed by this Court that the divorce was decreed "by reason of the wrongful acts, misdeeds, or omissions of her husband", in which case, of course, no refund of lobolo was obligatory - (vide section 81 of the Code). If an order for the return of lobolo was made by a Court of law it was obviously wrong and an appeal could have been brought against it.

For these reasons, this Court comes to the conclusion that Respondent cannot maintain an action for damages in respect of the pregnancy of his daughter as a result of which she gave birth in June, 1935; and that he has no locus standi. The point was not raised in the Court below but we consider that there was insufficient evidence to justify the finding of the Native Commissioner that Appellant was responsible for the pregnancy of Respondent's daughter. As we find, however, that Respondent has no locus standi, no good purpose would be served by an absolution judgment.

The appeal is upheld with costs and the judgment of the Native Commissioner is altered to read: "For Defendant with costs."

CASE NO. 17.

JAZI NXELE VS. DUMAZA NXELE.

ESHOWE. 16th October, 1935. Before B.W. Martin, President, C.W. Crawford, J.T. Boast, Members Native Appeal Court, (Natal and Transvaal Provinces).

Procedure - Noting of appeal - Application for extension of time - "Just cause".

AN APPLICANT, WHO WAS REPRESENTED BY COUNSEL IN THE NATIVE COMMISSIONER'S COURT, MUST SHOW "JUST CAUSE" BEFORE AN EXTENSION OF TIME WITHIN WHICH TO NOTE AN APPEAL WILL BE GRANTED.

This is an application for an extension of time within which to appeal against a judgment of the Assistant Native Commissioner, Eshowe.

The Applicant Jazi Nxele, in his capacity of heir to his late father Nquola, sued the Respondent, his uncle, in the Court of Native Chief Noqandela for fifteen head of cattle being the lobolo cattle of his aunt Ntombezine which he claimed had been wrongly received by Respondent during the lifetime of his (Appellant's) father.

The Chief gave judgment in favour of Applicant for the fifteen head of cattle claimed.

Respondent appealed against that judgment and the matter came before the Assistant Native Commissioner at Eshowe on the 29/1/1935, 20/3/35, 15/5/35, 23/5/35, 17/6/35 and 25/7/1935, when judgment was reserved.

Both parties were represented by Counsel during these proceedings.

The judgment of the Court was delivered on the 29th July 1935 when the Chief's judgment was set aside with costs.

The record does not disclose whether or not the parties were present or whether they were represented when the judgment was delivered but Counsel for Respondent (Mr. Kent) has assured us that both he and Applicant's Counsel (Mr. Rutherford) were in attendance.

Application is now made under Section 6 of the Rules of the Native Appeal Court for an extension of time within which to note an appeal against the Native Commissioner's judgment dated 29th July, 1935, it being urged in support of the application that the failure to note appeal timeously was due to the delay in securing a copy of the record which was required by the attorney (Mr. Gabriel) who was subsequently consulted by Applicant.

It was ascertained during the argument that the Applicant had become aware of the adverse judgment against him some time prior to the 6th August, 1935. This would allow him at least twelve days within which to secure all the information necessary to enable him to lodge his notice of appeal within the period prescribed by the rules.

The question to be decided is whether or not the ground urged is sufficient to warrant the granting of the relief sought.

The question of what constitutes "just cause" within the meaning of Rule 6 was fully discussed in the judgment of this Court in the case Silo Ndhlalose vs. Matshwelana Nzuza delivered on the 10th July, 1933, where in the principles by which this Court would be guided in matters of this nature are fully set out.

We see no reason to depart from those principles in the present case and being of the opinion that the Applicant has failed to adduce sufficiently weighty reasons in support of his application, it must be refused with costs.

CASE NO. 18.

PAUL CILI VS. MAHUZU CILI.

N.B.

MARITZBURG. 25th October, 1935. Before B.V. Martin, President, C.W. Crawford, J.T. Boast, Members Native Appeal Court (Natal and Transvaal Provinces).

Interpleader - Onus.

An appeal from the Court of Native Commissioner, Inanda (at Verulam).

THE PRESUMPTION, UNTIL THE CONTRARY IS PROVED, IS THAT OWNERSHIP OF ALL CATTLE WITHIN A KRAAL, VESTS IN THE KRAAL-HEAD. THE BURDEN OF PROOF RESTS ON CLAIMANT, AN UNMARRIED INMATE OF THE KRAAL.

This is an appeal from the judgment of the Assistant Native Commissioner, Inanda (at Verulam), in an

application.....

application in which the Appellant was the judgment creditor (Plaintiff) and the Respondent the Claimant in interpleader proceedings arising out of the case Paul Cili vs. Jim Cili which was heard in the Court of Native Chief Luzulane Ndhlovu and in which judgment was given in favour of Appellant against the Defendant, Jim Cili.

In pursuance of such judgment the judgment creditor (Appellant) had caused an attachment to be made of certain five head of cattle in the kraal of the Defendant, Jim Cili, the father of Claimant (Respondent). Application for the return of four of such cattle was unsuccessfully made by Claimant to the Native Chief concerned and an appeal against the Chief's decision was made to the Native Commissioner, Verulam, who upheld the appeal and set aside the attachment of the four head of cattle.

It is against the Native Commissioner's judgment that an appeal has been brought to this Court. The grounds of appeal are:-

(1)
The judgment is against the weight of evidence.

(2)
The Respondent has failed to discharge the onus which lay on him to establish that the cattle attached were his property and not the Defendant's.

On the question of onus, the Native Commissioner has stated in his reasons for judgment that he is of the opinion that as the cattle were in the possession of the Claimant at the time of attachment the animals must be presumed to be his, and that the onus was, consequently, upon the judgment creditor (or Appellant).

Now it is admitted that the Claimant is the son and heir of his father Jim Cili (judgment debtor) and that he is an inmate of the latter's kraal. It is also common cause that the cattle were attached in the kraal of his father (i.e. the judgment debtor). The Claimant admitted to this Court that he is as yet unmarried and consequently he must be considered to be an inmate of the kraal of his father and subject to the latter in all matters appertaining to the kraal. It must also be presumed, until the contrary is proved, that the ownership in all cattle within the kraal vests in the kraal head.

That being the position the Native Commissioner was clearly wrong in holding that the cattle in dispute were in the possession of Claimant and by placing the onus of proof upon the Appellant (judgment creditor).

The onus clearly rested on the Claimant to prove his ownership in the cattle in question and this Court must decide whether or not that onus was discharged.

The evidence of the Claimant regarding his ownership over the cattle in dispute is briefly as follows:-

He declares that some time in 1926 he purchased a certain cow, which he did not describe by colour, from an

Indian.....

Indian named Moonsamy Naiker, which cow bore the red cow which is one of the animals now in dispute. In proof of this purchase he produced a written document purporting to have been signed by one R.G. Naidoo on behalf of Moonsamy Naiker in which it is stated that he acquired a cow and bull calf for the sum of £4 on the 16th February, 1926, of which amount the sum of £1 is still due. The only other evidence adduced in respect of this cow is that of his father Jim Cili (the judgment debtor)who, while agreeing that a purchase of cattle was made, states that a black cow and calf and a black bull calf were purchased. He does not mention from whom the purchase was made but it must be assumed that he refers to the animals alleged to have been purchased from Naiker. It should be observed that whereas Jim Cili refers to the purchase of a cow and two calves the document referred to only makes mention of one cow and one calf. It should also be noted that the document was only obtained on, and is dated, the 27th June, 1935, the day before the hearing of the case. Strictly speaking that document should not have been admitted as evidence.

Whereas the Claimant declares that the red cow is the progeny of the cow purchased from Naiker the Appellant declares that it is the offspring of another beast the property of the judgment debtor, which he acquired as lobolo from one Simoni some years ago. Claimant while admitting the receipt by his father of two head of cattle from Simoni dit not, however, explain what became of them. It is therefore quite possible that they remained in the kraal of the judgment debtor and that the red cow is the offspring of one of them as alleged by Appellant.

As regards the remaining cattle under attachment, the Claimant describes them as follows, viz:-

(1) Black cow, received in exchange for a black bull from his father some time ago.

(2) Black cow with white spot on left side, the progeny of No. 1.

(3) Red bull tole with white spots on left side and forehead, the progeny of No. 2.

(4) Red cow - white spots all over body, the progeny of No. 1.

His father Jim Cili, on the other hand describes the cow which he gave in exchange for a black bull to the Claimant (i.e. No. 1) as a black heifer with white belly and star on forehead. This discrepancy in the description of that animal is, in the eyes of this Court, significant and raises a doubt in regard to the Claimant's ownership in it. This doubt, naturally, obtains in respect of the remaining animals which are the progeny of the black cow under discussion, and the Court has come to the conclusion that the Claimant has failed to discharge the onus which rested upon him.

The appeal is upheld with costs and the judgment of the Native Commissioner is altered to read: "The appeal from the Chief's judgment is dismissed with costs and the cattle in dispute are declared to be executable."

CASE.....

CASE NO. 19

MDINGI MHLONGO VS. MTSHABULI XULU.

DURBAN. 21st October, 1935. Before B.J. Martin, President, C.J. Crawford, J.T. Boast, Members Native Appeal Court, (Natal and Transvaal Provinces).

Practice - Review.

An application to review proceedings in the Court of Native Commissioner, Mtunzini.

ALTHOUGH OMISSIONS AND IRREGULARITIES AFFORD VERY STRONG GROUNDS FOR APPEAL, AN APPEAL COURT IS BOUND BY ITS RULES AND CANNOT ALLOW A MODE OF PROCEDURE NOT SO PRESCRIBED.

This is an application for a review of the proceedings in the case of Mtshabuli Xulu versus Siquva alias Essie Mhlongo which was heard in the Court of the Assistant Native Commissioner, Mtunzini, on the 22nd May, 1935.

In that case the Respondent sued his wife, who is the daughter of Applicant, for divorce on the grounds of adultery and wilful desertion.

There was no claim in the summons for the return of lobolo cattle nor was the Applicant cited as the guardian of Defendant for the purposes of the action nor was he joined as a co-defendant.

With the object of giving the woman locus standi in judicio, apparently, the Applicant was subpoenaed to appear as a witness at the trial, and, although the Native Commissioner's record does not disclose that fact, it is admitted that he was present in the Court during the trial.

Applicant took no part in the proceedings, however. He was not asked to plead to any claim for the return of lobolo cattle, nor was he called even as a witness.

The application for a divorce was not resisted and after formal evidence of adultery and desertion had been given an order of divorce was granted and in accordance with the provisions of Section 83(c) of the Natal Native Code it was ordered that eight head of lobolo cattle must be returned by Applicant to the Plaintiff.

There is no evidence on the record of any attempt having been made to reconcile the parties to the divorce action, as required by Section 78(3) of the Code.

Application is now made for the quashing of the whole of the proceedings in the Native Commissioner's Court on the following grounds, viz:-

(a) That it was irregular to make an order against Applicant in an action wherein he was neither a party nor was he cited as assisting his daughter;

(b).....

(b) That as the provisions of section 78(3) of the Native Code have not been complied with the order made by the Native Commissioner is irregular;

(c) That on the evidence the Native Commissioner was not entitled to grant a decree of divorce.

The irregularities and omissions referred to would, undoubtedly, afford very strong grounds in an appeal by either of the parties to the action in the Native Commissioner's Court. When, however, it was pointed out to Mr. Hoskings, who represented Applicant, that it had been held in the cases of Sitebe vs. Sitebe, 1930 N.A.C. (N. & T.) 1 and Mkontwana vs. Mntabani, 1932 N.A.C. (C. & O) 1, that a Native Appeal Court can only exercise its powers of review when a case has been brought before it by way of appeal, he replied that Applicant could not have appealed against the judgment as he was not a party to the case in which it was given. If this is so, Applicant had other remedies without coming to this Court as he could have applied for a rescission of the judgment in terms of Section 30(5) of the Rules of the Courts of Native Commissioners in civil proceedings published in Government Notice No. 2253 of 1928 or he could have instituted proceedings to have the writ of execution set aside on the ground that he was not a party to the action. If such action were unsuccessful he could then have brought the matter before this Court by appeal in the ordinary way.

This Court is a creature of statute and therefore bound by the terms of the statute creating it. Although Section 15 of the Native Administration Act grants this Court full powers to review any judgment or proceedings of a Native Commissioner's Court, Section 13(5) provides that the Governor-General may make rules regulating the procedure to be adopted. It therefore follows that this Court cannot allow a mode of procedure which has not been so prescribed as is the case with the present application.

The application is dismissed with costs.

CASE NO. 20.

NQANDENI NGCOBO VS. MLANDU NGCOBO.

DURBAN. 24th October, 1935. Before B. T. Martin, President, C.W. Crawford, J.T. Boast, Members Native Appeal Court (Natal and Transvaal Provinces).

Inheritance - "Ukungena" union - Section 72, Natal Code, 1932.

An appeal from the Court of Native Commissioner, Ndwedwe.

A SON BORN TO A HOUSE AS THE RESULT OF AN "UKUNGENA" UNION IS ENTITLED TO THE PROPERTY RIGHTS IN HIS OWN SISTERS. (N.B.:- THE EFFECT OF SECTION 72 OF NATAL CODE 1932, WAS TO CONFIRM THE DECISION IN NOZINKUKU VS. NTEZI 1914 N.H.C. 149 WHICH OVER-RULED THE CASE OF TEKEKA VS. CIYAMA 1902 N.H.C. 13).

The.....

The Respondent in this case is the natural son and general heir of the late Mvakwendhlu Ngcobo by his first and chief wife Nombaba.

The Appellant is the "ukungena" son of Mvakwendhlu by his second wife Mandikeyana who, after her husband's death, entered into an ukungena union with the latter's brother Fayedwa, and who, as a result of that union, bore the Appellant and three girls Nontombana (who died), Mantwanyana and Ntombazana. The ages of the surviving girls are stated to be twenty years and seventeen years respectively.

At the time of Mvakwendhlu's death the woman Mandikeyana had borne two children only by him, viz: Nomoya and Katazile. These girls were taken over by Respondent subsequent ot his father's death in his capacity of general heir, there being no heir to the house to which they belonged, and they do not enter into the case now under discussion.

The matter at issue between the parties is the property rights which accrued to the house of Mandikeyana subsequent to her "ukungena" union with Fayedwa, and which include the two girls Mantwanyana and Ntombazana.

The Native Commissioner, Ndwedwe, found against the Appellant, which in effect means that Respondent, and not he, is entitled to such property rights.

Appellant appeals against that decision and relies on the following grounds:-

(1) That he proved that he and his two sisters, the property rights in whom were claimed by Respondent, were the issue of a cognate union (ukungena) duly entered into according to custom.

(2) The learned Native Commissioner was wrong in holding that Appellant sought to dispossess an existing heir of rights which accrued to him by inheritance; the property rights in dispute not having existed at the time that the cognate union was entered into.

(3) The learned Native Commissioner omitted to give effect to the provisions of section 72 of the Natal Code of Native Law.

(4) The learned Native Commissioner erred in relying upon the case of Tekeka vs. Ciyana (1902 N.H.C. 13) in that at the time that the cognate union was entered into nothing was done to the prejudice of the then existing heir nor has it been sought to deprive the then existing heir of any rights that existed at the time the said cognate union was entered into.

(5) The learned Native Commissioner erred in failing to apply the principles of law laid down in the case of Nozinkuku vs. Mfezi (1914 N.H.C. 149) in that the property rights in dispute only accrued after the said cognate union had been consummated.

It.....

It is clear from the record that the unkungena union was regularly entered into in accordance with custom, that at the time of such union the Respondent was his father's sole and only son and his general heir, that he was only five or six years of age and consequently too young to be a party to the union or competent to abandon his rights of inheritance, that the Appellant and his two sisters Mantwanyana and Ntombazana are the result of that union and that consequently the property rights represented by them did not exist at the time of the union.

The points to be decided by this Court, therefore, are those raised in paragraphs 2,3,4 and 5 of the grounds of appeal, the chief of which is whether or not the Appellant is entitled to property rights or benefits that accrued after the ukungena union was entered into.

The Appellant's attorney submits that his client is so entitled and supports his argument by reference to the provisions of Section 72 of the Natal Code of Native Law, and to the ruling of the Native High Court in the case of Nozinkuku vs. Mfezi (1914 N.H.C. 149).

It is obvious from the Native Commissioner's reasons for judgment that he relied on that part of the judgment in the case of Tekeka vs. Ciyana which laid down, amongst other essentials, that the custom of ukungena can only be resorted to when there is no heir-at-law, or where the heir-at-law is old enough voluntarily to relinquish his rights to succeed.

The Native Commissioner has overlooked the fact that at a later date the correctness of that dictum was questioned and that it was overruled in the case Nozinkuku vs. Mfezi (1914 N.H.C. 149). He has also failed to consider the effect of Section 72 of the New Native Code of Native Law which undoubtedly was intended to confirm the decision in Nozinkuku's case and allay all doubts that had been raised by the case of Tekeka vs. Ciyana.

This Court is in accord with the views expressed in the case of Nozinkuku vs. Mfezi and agrees that the judgment therein is in accordance with strict Zulu Law on the question of property rights which accrue to a house after an ukungena union has been entered into. It would be inequitable to hold that a son born to such house, as a result of such a union, is not entitled to the property rights in his own sisters, or to hold that his right to succeed to the heirship in that house is inferior to that of the general heir of another house.

The appeal is upheld with costs and the judgment of the Native Commissioner is altered to one in favour of Plaintiff (Appellant) who is declared to be the heir to his mother's house and entitled to the property rights which accrued after her ukungena union with Fayedwa. Plaintiff to have costs in the Court below.

CASE NO. 21.

BAHLANA MJADU VS. DANI NTULI

ESHOWE.....

ESHOWE. 17th October, 1935. Before B.W. Martin, President, C.W. Crawford, J.T. Boast, Members Native Appeal Court, (Natal and Transvaal Provinces).

Illegitimate child - Property Rights - Incest.

An appeal from the Court of Native Commissioner, Mtunzini.

AN HEIR IS NOT ENTITLED TO PROPERTY RIGHTS IN A WOMAN BORN OF AN INCESTUOUS UNION TO WHICH HIS DECEASED FATHER WAS A PARTY.

Appellant is the husband, in a customary union, of a Native woman named Paulina who, before her marriage, was seduced by her cousin Matewu, the father of Respondent, and subsequently gave birth to the Native female Nohlango who is the subject of the dispute now before this Court.

Matewu was sentenced to undergo a term of imprisonment as a punishment for the offence and served his sentence.

Having committed what, in the eyes of the Zulus, is a heinous offence against morals Paulina was ordered to seek out, immediately, a man who would take her to wife, in order that her disgrace might be covered up.

She went to Appellant who married her, paying ten head of lobolo cattle for her, one of which was returned to him as an "Mvimba" (or closing up) beast. The record does not disclose whether or not the usual "Ngqutu" beast was paid and it is presumed that no such payment was made because of the fact that the woman was no longer a virgin.

In due course a female child, Nohlango, was born. The parties to this case are at variance regarding the time when and the place where this child was born. The Appellant and his witnesses declare that the birth took place at his kraal after his marriage to Paulina, while the Respondent claims that the birth occurred prior to the marriage and at the kraal of Paulina's father Gandana. The Native Commissioner found as a fact that Nohlango was born after marriage, in Appellant's kraal, and this Court is not disposed to differ from that finding. In any event, the point is not material to the issue in this case.

The girl Nohlango seems to have lived practically all her life with her mother in the kraal of her foster father, the Appellant. She has now reached a marriageable age and the property rights in her are claimed by Respondent who, besides being the son of the seducer of her mother (Paulina), has succeeded to the position of heir to the house to which her mother (Paulina) belonged before her marriage.

This case originated in the Court of the Zulu Chief Nikiza during January, 1935, when the Respondent, in his dual capacity of heir to his late father Matewu (who had previously become the heir to the house to which his cousin Paulina belonged before her marriage) claimed the custody of the latter's daughter Nohlango. The Chief gave judgment in favour of Respondent who was awarded the custody of the woman in dispute.

The matter was taken in appeal before the Assistant Native Commissioner, Ntunzini, who dismissed the appeal with costs, thereby confirming the Chief's award.

An appeal against the Native Commissioner's decision is now before the Court and it is submitted that the award of the property rights in the girl Nohlango to Respondent, the son of Matewu who was guilty of the crime of incest with Appellant's wife, is contra bonos mores and not in accordance with the principles of natural justice and equity, more particularly as Appellant has maintained and has stood in loco parentis to the girl Nohlango.

The Court is in complete agreement with this view. As already stated in this judgment, sexual intercourse between persons who are related to each other even in the remotest degree, and particularly those of the same "isibongo" or surname, is strictly prohibited amongst the Zulus. In olden days those who transgressed against this law would almost certainly be put to death or banished from the society to which they belonged. It is certain that no self respecting Zulu father would besmirch himself by profiting from the result of his daughter's shameful and reprehensible behaviour.

It has been urged that because the Respondent is claiming as heir to the house of Gamdana (Paulina's father) and not as the son of her seducer, the strictly moral ban should not prevail against him. The Court cannot uphold the view and is of opinion that the taint already referred to must attach to Respondent.

For the reasons stated this Court is not able to support the judgment of the lower Courts. To do so would be to put a premium on an act which is, in the eyes of the Zulus, a heinous offence against morals.

The appeal is upheld with costs on the higher scale. The judgment of the Native Commissioner is altered to one in favour of Defendant with costs.

CASE NO. 22.

MAPHALA NGCOBO VS. JAMES MABASA.

DURBAN. 22nd October, 1935. Before B.W. Martin, President, C.W. Crawford, J.T. Boast, Members Native Appeal Court (Natal and Transvaal Provinces).

Customary Union - Divorce - Return of lobola - Sections 80 and 83 Native Code 1932.

An appeal from the Court of Native Commissioner, Umzinto.

WHERE PLAINTIFF SUES HIS WIFE FOR DIVORCE AND DEFENDANT IS MERELY CITED AS HER GUARDIAN, AN ORDER CANNOT BE MADE AGAINST THE GUARDIAN WHEN HE IS NOT PROPERLY BEFORE THE COURT.

See Case overleaf
Shlamini v Nkuna
P H. 1938 R. 26

The.....

The Appellant is the guardian of Angelina Mabasa who was the Defendant in a case heard by the Native Commissioner, Umzinto, in which her husband James Mabasa applied for and obtained an order of divorce in a customary union.

In addition to granting the order of divorce the Native Commissioner, as required by Section 83(c) of the Natal Code of Native Law, ordered that four of the dowry cattle paid in respect of the divorced woman must be returned to Plaintiff, or their value £5 each.

It is against the latter order that appeal has been lodged, the following grounds being relied upon, viz:-

(1)

That the judgment was wrong and bad in law in that.-

(a) Appellant was not a party to the said action.

(b) Appellant was not given an opportunity either to plead to, or to lead evidence on the question of the return of dowry cattle.

(c) No claim for the return of the cattle was before the Court.

(2)

In any event (but only in the event of the Court finding against him in regard to Claim 1 hereof) Appellant appeals against the said order on the grounds that the award was, in view of all the circumstances of the case, excessive.

The position in this case is that the Appellant was not even associated with his daughter in the capacity of guardian when the original summons for divorce was issued on the 7th December last, one Itabata Goba having been named as her guardian for the purposes of the case. It was only on the return date (22/1/1935) that the error was noticed and on Plaintiff's application the Appellant's name was substituted for that of Itabata Goba, and the case was adjourend till the 25th February, 1935, to enable compliance with the provisions of Section 78(3) of the Code which had not been observed.

On the day following the adjournment (23/1/1935) an amended summons, in which the Appellant was cited not only as the assistant and Protector of Defendant but also as a Co-Defendant in so far as the claim for the return of the "lobolo" is concerned, was handed in to the Clerk of the Court, and, according to the report of the last named official, it, together with the notice which accompanied it, was duly served on the Appellant.

Appellant appeared before the Court on the 25th February, 1935, when the application for divorce was disposed of and the order now appealed against made.

In reply to questions put by this Court at the last date of hearing the Native Commissioner has stated that he cannot say definitely whether or not the amended summons formed part of the record when the plea was taken. He says that his notice was not directed to the substituted summons and that he only noticed it amongst the papers at the close of

Defendant's....

Defendant's case. He says definitely that Appellant was not given the opportunity of pleading to the summons, adding "I have never regarded the guardian in a divorce case as a Co-Defendant but merely as assisting his ward in the action so as to give her locus standi in judicio, and have never given him the opportunity to plead. The issue before the Court is whether or no the divorce is to be granted; and that is a matter between husband and wife."

It is obvious, therefore, that the Appellant was never properly before the Court in the capacity of Co-Defendant as required by Section 80 of the Code, nor was he given an opportunity to resist any order for the return of lobolo cattle.

Notwithstanding these facts the Native Commissioner ordered that Appellant must return four head of lobolo cattle to Respondent in terms of Section 83(c) of the Code.

He was clearly wrong in doing this in view of the provisions of Section 80 of the Code which must be read in conjunction with Section 83.

As no claim for the return of lobolo was made in the original summons, which was the only document before the Court, it is the opinion of this Court that the Native Commissioner erred in making the order under discussion.

The appeal is upheld with costs and that part of the Native Commissioner's judgment ordering the Appellant to return four head of cattle to Respondent is deleted.

CASE NO. 23.

EPHRAIM MAZINYO SHONGWE VS. SHETTINA MTETWA, duly assisted.

PRETORIA. December 9, 1935. Before B.W. Martin, President, H. Sinclair Fynn and C.J. Sweeney, Members of Court (Transvaal and Natal Provinces).

NATIVE APPEAL CASES - Defamation - Zulu custom - Measure of damages.

An appeal from the Court of Native Commissioner, Piet Retief.

Respondent, the daughter of a chief, who was engaged to be married to Appellant, who had paid a portion of the lobolo, sued Appellant for £20 damages for defamation in respect of an alleged defamatory utterance by him in which her moral character and chastity were attacked. Cohabitation between the parties had already taken place, resulting in the birth of twins.

The Native Commissioner who elected to try the case under the Common Law gave judgment for Plaintiff for £7 and costs.

Defendant appealed.

Held. That as the parties to the dispute are Zulus, defamation is an actionable wrong, particularly in the case of unmarried females, vide Section 133 of Natal Native Code which, though not applicable outside Natal, is an exposition of Zulu customary law and might well be used in the Transvaal when the parties are Zulus.

That in pure Zulu law Respondent was entitled to demand from her slanderer the payment of the largest ox obtainable to wipe out the stain and stigma and that although the case was tried under the Common law, it cannot be said that the amount of £7 awarded is an excessive equivalent for a large ox.

Appeal dismissed with costs on higher scale.

FOR APPELLANT. Mr. L. Perkins of Messrs. de Villiers and Pickard, Pretoria.

FOR RESPONDENT. Mr. M.J. Hart of Messrs. Stegmann, Oosthuizen and Jackson, Pretoria.

MARTIN, P., delivering the judgment of the Court:

This is an appeal against the judgment of the Native Commissioner, Piet Retief, in a case wherein Respondent was Plaintiff and sued Appellant for £20 as damages in respect of an alleged defamatory utterance by the latter in which the moral character and chastity of Respondent were attacked.

The Native Commissioner's judgment was in favour of Respondent who was awarded damages in the sum of £7 and costs of suit.

An.....

An appeal was noted against that judgment on five grounds, some of which were frivolous and should not have been taken.

Counsel for Appellant, at the outset of his address rightly intimated to the Court that he could not support the grounds of appeal except in so far as they relate to the amount of damages awarded to Respondent which he contended were excessive.

It is therefore only necessary for this Court to decide the issue as regards damages.

The evidence in this case reveals that the parties were engaged to be married and a part of the lobolo has actually been paid. Cohabitation had taken place resulting in the birth of twins. Then on a certain occasion, on the date on which the offending words were uttered, Appellant alleges that he found Respondent in what he regarded as "suspicious circumstances" with another man. The only evidence of such suspicious circumstances is that of the Appellant which is recorded in the following terms, viz:-

"Ek het Eiser gekry by Mr. White's brickyard .....
"Madonsela was saam met haar daar in suspisiese omstandighede.
"Ek het woorde met haar gehad. Sy het 'n pink rok aangehad en
"'n man se onderbaadjie."

Respondent denied being seen at the brickyard in the company of another man and the Native Commissioner has found that the Appellant's evidence on that point cannot be accepted. This Court sees no reason to differ from the Native Commissioner in that regard.

It is clear that Appellant went to the residence of Mr. Waterfied, where Respondent is employed, and there publicly uttered the words set out in the summons. Such words are unquestionably defamatory per se both at Common Law and in Zulu Law and having been uttered maliciously they are actionable.

It is convenient to indicate here that defamation of character is an actionable wrong in Zulu Law, particularly in the case of unmarried females. Section 133 of the Natal Code of Native Law reads as follows, viz.-

"Any unmarried female whose chastity has been publicly
"denied, scoffed at, or impeached by any person, is entitled
"to damages for the slander."

The Natal Code is not, of course, applicable outside Natal but it is an exposition of Zulu Customary Law and it might well be used as a guide by Native Commissioners in the Transvaal when adjudicating in matters in which the parties are Zulus, as is the case in the matter now under discussion.

In the circumstances related above the Native Commissioner rightly awarded damages to Respondent. The latter is the daughter of a chief and, therefore, a person of standing amongst other Natives. In pure Zulu Law she would have been entitled to demand from her slanderer the payment of the largest

ox obtainable as compensation for the insult suffered by her, and for the purpose of wiping out the stain and stigma engendered thereby. It cannot be said that the sum of £7 is an excessive equivalent for a large ox and this Court is not prepared to assess damages on a lower scale.

In conclusion the Court directs the attention of Native Commissioners to the rulings of this Court contained in the cases Charles Solomon Ngguboya vs. William Mutato N.A.C. (T. & N.) 1929 and Jacob Mtsabelle vs. Jeremiah Poolo N.A.C. (T. & N.) 1930 in which it was laid down that where Native Law provides a remedy that law should be applied, and further that Native Commissioners should signify as early as possible in the proceedings their decision regarding the system of law to be applied to the case, which decision should be duly recorded in the record of the case.

The appeal is dismissed, with costs on the higher scale. The judgment of the Native Commissioner in favour of Respondent (Plaintiff) for £7 and costs is confirmed.

Appeal No 19, 1933 N.A.C
Case No 1, 1936

CASE NO. 24.

MAHONGANE SIHELANE AND ANOTHER VS. PETRUS SUGAZIE.

PRETORIA. December 10, 1935. Before B.W. Martin, President, H. Sinclair Fynn and C.J. Sweeney, Members of Court (Transvaal and Natal).

NATIVE APPEAL CASES - Zulu custom - Widow - Long cohabitation with male person - Presumption.

An appeal from the Court of Native Commissioner, Piet Retief.

Respondent sued first Appellant and another for the delivery of first Appellant's daughter or the return of lobolo paid for her. First Appellant contended that he was incorrectly sued as the girl being the issue of his cohabitation with a widow for whom he did not pay dowry, he was not the girl's natural guardian.

Held: That the omission to pay lobolo and the absence of the usual marriage ceremonial have little, if any, significance where a widow or divorced woman is concerned. In such cases the presumption is that the union of the parties is regular.

Appeal upheld on other grounds.

FOR APPELLANT Mr. M.J. Hart of Messrs. Stegmann, Oosthuizen and Jackson.

FOR RESPONDENT: Advocate P. Hugo instructed by Messrs. Roux and Jacobsz.

MARTIN, P., delivering the judgment of the Court:

This.....

This case comes in appeal from the Court of the Native Commissioner, Piet Retief.

The original summons in the case was issued on the 20th June, 1935, at the instance of Respondent and was directed against the Appellant alone. It was prepared by Respondent's attorney and the claim stated therein was for:-

(a)

"The delivery of Paulina Simelane the daughter of "Defendant (Appellant), whom he 'sold' to Plaintiff (Respond- "ent) and for whom Plaintiff (Respondent) has paid eleven head "of cattle, as lobolo, and whom Defendant notwithstanding "repeated demands, refused to deliver. Should the said "Paulina not be delivered then Plaintiff (Respondent) claims "return of eleven head of cattle paid to Defendant during "1933, plus the increase thereof."

(b)

"Plaintiff further claims a declaration of right as "to the child born by the said Paulina Simelane, and custody "of the said child, for whom he paid Defendant customary "damages as the child was born before the said Paulina was "lobolad."

The case came before the Court of the Native Commissioner, Piet Retief, on the 9th July, 1935, when Appellant's attorney filed a plea denying the "sale" of Paulina, and alleging failure on the part of Respondent to complete the payment of lobolo, seduction of Paulina before marriage for which offence one "nvimba" beast was paid, cancellation of the agreement to marry etc. etc. It was further urged that it was incompetent for the Court to make an order about the child because "Paulina" was not before the Court.

The case was thereupon postponed until the 27/8/1935. On that date Respondent's attorney sought leave to join Paulina with her father as co-defendant which was allowed by the Court. The only witness examined on this day was Chief Ngubu Dhlamini, a so-called expert on Native Customary Law, whose evidence was objected to by Mr. Attorney Olmesdahl as being inadmissible, the admission of which forms one of the grounds of appeal. The case was then further postponed until the 17th September, 1935.

On the 16th September, 1935, notice was filed by Respondent's attorney of his intention to apply for the amend- ment of the original summons to include in paragraph (a) the words "The said Paulina was living with Plaintiff but has deserted him, and is now living with her father, the said Mahongane Simelane", and the substitution in paragraph (b) of the words "before Plaintiff had paid all the lobolo for the said Paulina Simelane" for the original words "before the said Paulina was lobolad."

On the same day Appellant's attorney gave notice of intention to amend his client's plea by adding thereto the following words, viz:-

"Defendants plead that no lobolo for the first "Defendant's mother was paid and that the eldest son is the

party.....

"party to be sued. She was a widow and merely cohabited with "second (? first) Defendant to raise seed for her house."

When the hearing of the case was resumed on the 17th September, 1935, the Court allowed the amendment of the summons in terms of the abovementioned applications. An amendment of the original plea by the addition of the following words thereto was also allowed, viz.-

"Paulina states she is the mother and natural guardian "of the child and to rob her of the custody thereof is "opposed to the principles of Public Policy and Natural "Justice. Plaintiff is not a fit and proper person to have "custody of the child."

The issues having, at long last, been made fairly clear, the hearing of the case then proceeded.

Before discussing the merits of the case the Court feels impelled to comment on the unskillful manner in which this matter was brought before the Court of the Native Commissioner.

The original summons was not as complete and explicit as it should have been and it was largely due to its deficiencies that there was considerable waste of time before the trial commenced. A further waste of time, to say nothing of an increase in the cost of litigation, was brought about by the filing of frivolous, unnecessary, and not too skillfully drawn pleas and counter pleas. Once again this Court draws attention to the necessity to simplify, as far as possible, the procedure in the Courts of Native Commissioners. It was for this reason that the framers of the Rules of Native Commissioners' Courts omitted to make the elaborate provisions that are contained in the Rules of Magistrates' Courts in regard to pleadings, objections, exceptions, etc. The procedure to be followed is clearly laid down in Rule 26(a) of the Courts of Native Commissioners and the provisions of that rule should be observed. Where there has been a departure from prescribed procedure, which has resulted in wasted or increased costs, Native Commissioners should take cognisance of that fact when considering the question of costs.

As regards the merits of the case, it is as well to state, as a preliminary to further discussion, that as there is no direct reference in the proceedings regarding the nationality of the parties to the case the Court assumes from their names and surnames and the geographical position of their districts of residence that they are Zulus and the legal aspects of the case will, consequently, be judged in accordance with the customary laws of the people of that race.

Before proceeding to discuss other aspects it is necessary to first decide the status of first Appellant in the family to which second Appellant (Paulina) and her brother Lota Simelane belong. It is contended that inasmuch as first Appellant did not pay lobolo for the mother of those children he has been incorrectly sued for the return of lobolo cattle received for Paulina and that the claim should have been brought against her brother Lota Simelane.

It is admitted by first Appellant that he did not pay lobolo for his wife. He explains that she was the widow of one Mandoale Faguti, that he "found" her, took her unto himself as

wife.....

wife without formality, lived with her in the relationship of man and wife, and that as a result of such cohabitation the three children Alpheus (deceased), Paulina and Lota were born.

The omission to pay lobolo and the absence of the usual ceremonial of marriage would be significant factors in cases of cohabitation with a spinster but they have very little, if any, significance when a widow or divorced woman is concerned. In such cases it is not usual to strictly observe the formalities that attach to an ordinary union with an unmarried girl. In cases such as the one under discussion the presumption is always that the union of the partners is regular and that presumption has not been rebutted in this case. The Court must hold, therefore, that the union between first Appellant and the mother of Paulina and Lota was regular and that as their natural father he is the proper person to be sued. The correctness of this conclusion is strengthened by the fact that the offspring of the union bear the surname of their natural father, viz. "Simelane" and not that of their mother's first husband which was "Faguti".

The next point to be decided is whether or not there was a completed legal union between Respondent and Paulina. The Native Commissioner found in the affirmative and based his finding on the payment of a portion of the (1) lobolo, the (2) killing of certain cattle, the provision and (3) consumption of beer, and (4) cohabitation which resulted in the birth of a child etc. etc. These happenings, when unaccompanied by the ceremonials and formalities which are (or should) be observed in any well organised community of Natives, cannot be held by this Court to constitute a legal union. The mere slaughtering of animals and feasting unless it takes place on the actual wedding day proves nothing. Such slaughterings usually take place on several occasions prior to the actual celebration of a marriage, e.g. on the occasion of the bride's formal betrothal visit to the kraal of her future husband, and again when she is escorted back to her father's kraal to await completion of marriage arrangements. There is a complete absence of evidence of the observance of any marriage ceremonial in this instance and this Court is not prepared to condone such slackness. We hold that there was no legal union between Respondent and Paulina.

The Respondent is, therefore, not entitled to demand the return of Paulina to him. All he is entitled to recover is such of his lobolo cattle as exist at the present time plus any increase that may have accrued to them during the period they have been in the possession of first Appellant. It is well established law that all lobolo cattle are regarded as "Sisa" cattle until the ceremony of marriage has actually been held. The term "Sisa" means a custom whereby cattle or other livestock are deposited by their owner with some other person on the understanding that such person shall enjoy the use of them, but that the ownership shall remain with and increase accrue to the depositor. In other words, in the case of marriage, the "dominium" in lobolo cattle remains with the bridegroom and does not pass to his father-in-law. It follows, therefore, that all profit and loss in respect of such cattle must be enjoyed or borne, as the case may be, by their owner. In this case it has been conclusively proved that eleven head of lobolo cattle were delivered to first Appellant. There is very little evidence on the record regarding the number of increase to such cattle. The witnesses Kantoor (? Mkantolo) and Ngosana

speak.....

about two calves but there are no details regarding them, and first Appellant admits that one of the lobolo cattle received by him had a calf. He says, however, that such calf represents the eleventh lobolo beast. The existence of the other calf has not been disputed by Appellants and the Court must hold that there is proof that at least one increase has accrued to the lobolo cattle bringing the total number returnable to twelve head.

It is clear that the customary "Mvimba" beast was paid by Respondent in respect of his seduction of the second Appellant. Respondent contended that the payment of such beast entitles him to the custody of the child resulting from such illicit intercourse even though marriage with her mother has not taken place. That contention cannot be supported. It is not in accordance with Zulu Law. The payment of a Mvimba beast amongst the Zulus has the effect of restoring the virginity of a seduced girl in the eyes of the world, and compensates her father for the loss of the lobolo beast which he is debarred from claiming from any future suitor by reason of the fact that she has already borne a child. This beast represents special damages, as the marriage value of the girl has decreased by a beast in respect of each child she has had (see Msonti vs. Dingindawo, 1927 N.A.C. p. 1 which went in appeal to the Appellate Division of the Supreme Court). The payment of an "imvimba" beast does not entitle the seducer to claim the custody of the resulting child, who belongs to the house to which the mother belongs. The Native Commissioner was wrong, therefore, in awarding the custody of Paulina's child to Respondent.

The matter of the Inqutu beast which is due and payable to the mother of a girl who has been seduced is not mentioned in this case and as it has not been claimed in the summons the Court is not in a position to take it into consideration in making its award in respect of the cattle to be returned to the Respondent. Mention is merely made of the matter, in passing, as an indication that a claim may be made for such a beast if it has not already been paid.

It having been decided that first Appellant must be regarded as the father and guardian of the second and third Appellant it must be held that the citation of them as co-defendants was unnecessary and irregular. In any case the third Defendant was never before the Court and the Native Commissioner erred in making his judgment operative against him.

In conclusion this Court refers to the practice which seems to prevail in many of the Courts of this Province of referring to the giving and taking of Native girls in marriage as "buying" and "selling" as if they were goods and chattels. The use of such terms is grossly irregular and should be discontinued.

The appeal is upheld with costs in this Court on the higher scale.

The judgment of the Lower Court is set aside and the following substituted, viz.-

"For Plaintiff for the return of eleven lobolo cattle "and one beast the increase thereof.

"The illegitimate child born to Paulina as the result "of her illicit intercourse with Plaintiff is declared to "belong to the family of first Defendant."

In view of the unsatisfactory manner in which the proceedings in the Native Commissioner's Court were conducted and of the fact that each party has been partially successful therein, there will be no order as to costs in that Court.

MALINDISA G. A.